Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

ROBERT H. BARRETT,
Petitioner,

v.

BOROUGH OF CARLISLE,
Respondent.

On Petition For Writ Of Certiorari
To The Commonwealth Court Of Pennsylvania

PETITION FOR WRIT OF CERTIORARI
Volume 1

Robert H. Barrett
Petitioner, *pro se*
136 East High Street
Carlisle, Pennsylvania 17013
(703) 524-5949 or (717) 243-0989

29 pp

QUESTIONS PRESENTED

1. Whether property owners were deprived of rights to due process of law by the Pennsylvania Historical and Museum Commission in alleged historic certification proceedings, in violation of 42 U.S.C. § 1983?

Proposed Answer: In the Affirmative

2. Whether property owners were deprived of rights to just compensation by the Borough of Carlisle for regulating property within the Carlisle Historic District, absent valid historic certification, in violation of 42 U.S.C. § 1983?

Proposed Answer: In the Affirmative

3. Whether Petitioner was deprived of Fourth Amendment rights to be secure in his properties and papers against unreasonable searches by the Court of Common Pleas of Cumberland County, Pennsylvania, Bayley, J., who issued discovery orders against Petitioner's properties and papers, in violation of 42 U.S.C. § 1983?

Proposed Answer: In the Affirmative

4. Whether Petitioner was deprived of Fifth Amendment rights to just compensation by the Court of Common Pleas of Cumberland County, Pennsylvania, Bayley, J., who through a default judgment against Petitioner appointed an agent to take possession of and to sell Petitioner's properties, in violation of 42 U.S.C. § 1983?

Proposed Answer: In the Affirmative

PARTIES TO PROCEEDING

In addition to the parties named in the caption, the Pennsylvania Historical and Museum Commission (a state agency) allegedly certified the Carlisle Historic District, thereby, establishing the basis for subsequent harm by Respondent, the Borough of Carlisle.

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2. OPINION AND ORDER of the Commonwealth Court of Pennsylvania at No. 423 C.D. 2000, dated August 23, 2000, which denied Petitioner's appeal (*See* Appendix B).

3. AMENDED FINAL DECREE of the Court of Common Pleas of Cumberland County, Pennsylvania at No. 98-4145 Equity Term, dated January 24, 2000, which entered a default judgment against Petitioner and, *inter alia*, appointed an agent to take possession of and to sell eight (8) improved properties owned by Petitioner (*See* Appendix C).

4. ORDER OF COURT of the Court of Common Pleas at No. 98-4145 Equity Term, dated October 13, 1999, which committed Petitioner to county prison for civil contempt of court (*See* Appendix D).

5. ORDER OF COURT of the Court of Common Pleas at No. 98-4145 Equity Term, dated July 07, 1999, which committed Petitioner to county prison for civil contempt of court (*See* Appendix E).

6. OPINION IN SUPPORT OF ORDER DATED JUNE 03, 1999 of the Court of Common Pleas at No. 98-4145 Equity Term, dated June 23, 1999, which directed Petitioner to respond to Respondent's discovery requests (*See* Appendix G).

7. ORDER OF COURT of the Court of Common Pleas at No. 98-4145 Equity Term, dated June 03, 1999, which directed Petitioner to respond to Respondent's discovery requests (*Incorporated in the court's opinion at* Appendix G).

8. ORDER OF COURT of the Court of Common Pleas at No. 98-4145 Equity Term, dated April 23, 1999, which denied Petitioner's subpoena for historic district certification records (*See* Appendix H).

JURISDICTION

On July 22, 1998, Respondent filed a civil action against Petitioner in the Court of Common Pleas of Cumberland County, Pennsylvania at No. 98-4145 Equity Term. On January 24, 2000, the Court of Common Pleas entered a default judgment against Petitioner.

On February 22, 2000, Petitioner filed an appeal in the Commonwealth Court of Pennsylvania at No. 423 C.D. 2000, which Court affirmed the Court of Common Pleas default judgment against Petitioner on August 23, 2000.

On September 21, 2000, Petitioner filed a Petition for Allowance of Appeal with the Supreme Court of Pennsylvania, Middle District at No. 692 M.D. Allocator Docket 2000, which Court denied the Petition on January 08, 2001.

The United States Supreme Court has jurisdiction in this matter pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the following constitutional and statutory provisions, which are set out in Appendix O:

1. The Fourth Amendment to the United States Constitution.

2. The Fifth Amendment to the United States Constitution.

3. The Fourteenth Amendment to the United States Constitution.

4. 28 U.S.C. § 1257(a)

5. 42 U.S.C. § 1983

STATEMENT OF THE CASE

This is the second of five (5) related cases working through State and Federal Courts to the Supreme Court of the United States for writ of certiorari. The first case was docketed at No. 00-977. The recurring issue in each of these cases is the deprivation of rights to due process of law and just compensation, secured by the Fifth and Fourteenth Amendments to the United States Constitution, under color of state law, in violation of 42 U.S.C. § 1983. These violations began during alleged historic certification proceedings by the State Historical and Museum Commission (herein, "the State Commission") in establishing the Carlisle Historic District (herein, "the Historic District"). The violations continued through subsequent regulation of property within the Historic District, by Respondent, the Borough of Carlisle (herein, "the Borough"), including regulation of the simple appearance of property, the issuance of citations against property in the absence of public fire, safety or health hazards, the condemnation of buildings without valid cause, and the denial of building and demolition permits for refusal to submit to historic board reviews.

In the immediate State equity action brought by the Borough, Petitioner, Robert H. Barrett (herein, "Barrett"), was further denied Fourth Amendment rights by the Court of Common Pleas of Cumberland County, Bayley, J. (herein, "the Trial Court"), which ordered Barrett to allow warrantless searches of his properties and papers under discovery proceedings. (*See* Appendices F and G) The Trial Court further violated Barrett's Fifth and Fourteenth Amendment rights by entering a default judgment against him and

appointing an agent to take possession of and to sell Barrett's improved properties for refusing to allow warrantless searches of his papers and for refusing to comply with local historic district regulations. (*See* Appendix C)

In each of these cases, Barrett avers that the Borough regulates property within the Historic District in the absence of valid historic certification. Barrett avers that the Historic District is not valid and cannot be regulated under State law because it has not been certified as historically or architecturally important by the State Commission. Although the Borough alleges that the Historic District was certified by the State Commission, there is no factual evidence that the State Commission ever conducted certification proceedings or certified the Historic District. If the State Commission, in fact, conducted any kind of certification proceedings, property owners were denied procedural and substantive due process of law during those proceedings, were unaware that an historic district was being established, were unaware that their properties were to be included in the proposed Historic District, and were unaware of the regulatory taking of their property rights. Barrett avers that regulation of property within the Historic District, absent valid historic certification which included affording property owners substantive and procedural due process of law, constitutes an unlawful regulatory taking of property rights under the Fifth and Fourteenth Amendments to the United States Constitution. Barrett also avers that property owners are entitled to just compensation for the taking of their property rights when the historical or architectural importance of their property has not been established.

In the first case which Barrett appealed to the Supreme

Court of the United States at No. 00-977, the United States District Court for the Middle District of Pennsylvania dismissed Barrett's complaint based on alleged *res judicata* of the issue in State Courts. Barrett avers that the State Courts denied judicial review of the historic certification and dismissed his appeal based on an incorrect interpretation of the decision of the United States Supreme Court in Penn Central Transportation Company v. New York City, 438 U.S. 104 (1978). The State Courts incorrectly interpreted Penn Central to mean that historic designation is **never** a Fifth Amendment taking, even when property owners were denied procedural and substantive due process of law in historic certification proceedings. Under the State's interpretation of Penn Central, the State Commission may certify, and local government may regulate, any property under the guise of historic preservation without notification of the property owner or other rights of due process.

In the immediate case, Barrett was twice committed to county prison for civil contempt of court. (*See* Appendices D and E) In the first instance, Barrett was committed indefinitely for refusing to allow the Borough to conduct warrantless searches of his improved properties under a discovery order issued by the Trial Court. After forty-one (41) days imprisonment under lock-down conditions, Barrett agreed under duress to allow the searches in order to return to his position with the Federal government.

In the second instance, Barrett was again committed indefinitely to county prison, under lock-down conditions, by the Trial Court for refusing to allow warrantless searches of his papers and refusing to answer interrogatories concerning his financial status. While in prison, Barrett was forced to

retire from his Federal position in order to maintain his financial obligations through a retirement annuity. After forty (40) days, Barrett was released under threat that the Trial Court would enter a default judgment against him if he failed to provide the requested financial information. On January 14, 2000 (subsequently amended on January 24, 2000), the Trial Court issued a default judgment against Barrett in which the Trial Court appointed an agent to take possession of and to sell Barrett's eight (8) improved properties for refusing to allow warrantless searches of his papers and refusing to comply with Historic District regulations.

The Commonwealth Court of Pennsylvania subsequently affirmed the decree of the Trial Court and denied Barrett's appeal. (*See* Appendix B)

Barrett filed a Petition for Allowance of Appeal with the Pennsylvania Supreme Court which denied the petition on January 08, 2001. (*See* Appendix A)

REASONS FOR GRANTING THE WRIT

Introduction.

Within the Commonwealth of Pennsylvania, the designation of "historic districts" has evolved into a scheme by which local governments take control of tens of thousands of properties under the **pretense** of preserving historically or architecturally important properties. With few exceptions, such as Philadelphia's Independence Hall, most Pennsylvania historic districts contain little or nothing of historical or architectural importance. Most historic districts are typically composed of common, older buildings in areas where local governments want to increase the tax base. There is no lawful basis for most Pennsylvania historic districts. Local governments regulate historic districts just as homeowners' associations regulate housing developments. "Historic boards" are appointed which dictate the simple appearance of property. However, the significant difference between homeowners' associations and government regulation of historic districts is that home owners agreed as a condition of sale to the contractual arrangement with the homeowners' association. In most historic districts, property owners were never given a choice in the matter. Barrett has owned property in the area designated as the Historic District for over thirty (30) years, and before the alleged certification of the district. When the Historic District was established, all exterior property rights were summarily taken without due process of law by the State Commission and by the Borough. In a thirteen (13) block area with over a thousand (1,000) properties, property owners summarily lost all property rights to the exterior of their property. Property owners within the Historic District never knew that the Historic District was

established until years later. Where property is truly historically important, such action might be lawful if just compensation were paid for the taking of property rights. However, in the Historic District, at issue in this case, there is no factual evidence of any properties which are truly of historical or architectural importance to justify the wholesale regulatory taking of property rights which has occurred in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

I. **Pennsylvania State Courts incorrectly interpreted the decision of the United States Supreme Court in Penn Central Transportation Company v. New York City, 438 U.S. 104 (1978) to deny that historic certification constitutes a Fifth Amendment "taking" when property owners are denied procedural and substantive due process of law before the certifying authority in historic certification proceedings.**

In Penn Central the property owners were the Penn Central Transportation Co., et al., and the property at issue was Grand Central Terminal in New York City. In Penn Central, the United States Supreme Court held:

> "On this record, we conclude that the application of New York City's Landmarks Law has not effected a 'taking' of appellants' property. The restrictions imposed are substantially related to the promotion of the general welfare, and not only permit reasonable beneficial use of the landmark site, but also afford appellants opportunities further to enhance not only the Terminal site proper but also other properties."

Pennsylvania State Courts have ignored the case specific conditions inherent in this decision and mistakenly concluded that historic certification is **never** a Fifth Amendment "taking. Pennsylvania State Courts subsequently concluded that property owners do not have a right (1) to procedural and substantive due process of law before the certifying authority during historic certification proceedings, and (2) to subsequent judicial review of historic certification.

The Pennsylvania State Courts ignored essential conditions of Penn Central. In Penn Central:

(1) Property owners were afforded due process of law because they were notified in advance that the New York City Landmarks Preservation Commission proposed to certify Grand Central Terminal as a landmark site and were provided an opportunity to review and challenge the criteria and evidence supporting such certification.

(2) Although the owners opposed the certification before the New York City Landmarks Preservation Commission, they did not seek judicial review of the final certification. The owners thereby let stand the assumption that sufficient evidence existed to support the landmark certification.

In contrast, the Pennsylvania State Courts improperly denied that historic certification and regulation of the Carlisle Historic District constituted a Fifth Amendment "taking," even though property owners were denied procedural and substantive due process of law during historic certification proceedings before the State certifying authority.

In fact, a complete and accurate reading of Penn Central

establishes that historic certification must be based on a Constitutionally valid certification process which (1) affords property owners due process of law before the certifying authority and (2) establishes a valid historical or architectural basis for certification. Only after the property owner has been afforded due process before the certifying authority, and after a valid basis has been established for historical or architectural importance of the proposed property, can the property finally be certified as historic. Penn Central establishes that a Fifth Amendment "taking" does not occur when property is first certified as historic based on a constitutionally valid historic certification process which afforded property owners due process of law. But Penn Central does not eliminate the requirement that historic certification proceedings must first be conducted which afford property owners procedural and substantive due process of law before the certifying authority.

Where property owners are denied substantive and procedural due process of law in historic certification proceedings, the conclusions of those proceedings are Constitutionally defective and cannot serve as a basis for regulating property and the taking of property rights. Absent the opportunity for property owners to review historic certification criteria, to review evidence supporting the historical or architectural importance of proposed property, and to challenge historic certification, the historic certification process violates the substantive and procedural due process protections of the Fifth and Fourteenth Amendments and constitutes an unconstitutional, regulatory "taking" of property rights.

II. Pennsylvania State Courts denied judicial review of historic certification proceedings, including final historic certification.

Pennsylvania State Courts refused to review the historic certification of the Carlisle Historic District, and the subsequent "taking" of property rights through property regulation. Ignoring the fact that property owners were denied due process of law and never notified of the proposed certification, or afforded an opportunity to review certification criteria, or to review any substantial supporting evidence, or to file objections to the proposed designation or to seek judicial review of final historic certification, Pennsylvania State Courts claimed that the time for reviewing the historic certification was within thirty (30) days of the certification. The Pennsylvania State Courts completely ignored the fact that most property owners never knew of the historic certification until years later.

It is a well-settled matter of law that a statute of limitations cannot begin to run until the claim itself accrues. A cause of action does not accrue until a wrongful act causes injury to the party. The United States Supreme Court has repeatedly held, as it did in 1980, that a Fifth Amendment claim for just compensation is not "ripe," and therefore cannot be adjudicated, until a regulation has been specifically applied to the property and has caused specific harm, Gains v. City of Tiburon, 447 U.S. 255 (1980). In the present case, the claims under the due process and "takings" protections of the Fifth Amendment did not become "ripe" until the Borough of Carlisle refused to issue Petitioner permits based on Historic District regulations.

In denying judicial review of the historic certification,

Pennsylvania State Courts improperly denied Petitioner's right of due process of law under the Fifth and Fourteenth Amendments to the United States Constitution.

III. **The Court of Common Pleas of Cumberland County, Bayley, J., violated Petitioner's rights under the Fourth Amendment in issuing a discovery order allowing Respondent to search Petitioner's properties and papers.**

The Fourth Amendment to the United States Constitution states:

> "The right of the people to be secure in their houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

At issue is whether court-ordered discovery through administrative "inspections," production of documents, and disclosure of financial information through interrogatories constitutes searches within the meaning of the Fourth Amendment to the United States Constitution? Petitioner argues that such "inspections" and demands for information are, in fact, searches under the Fourth Amendment and are subject to the warrant procedures of the Fourth Amendment.

On June 01, 1999, the Trial Court heard on-record argument on the Borough's motion to compel compliance with their discovery requests, including the Borough's request for entry upon Barrett's properties. At that hearing, the Borough presented no statement of facts or evidence

against Barrett's properties to establish probable cause for general entry upon all eight (8) of Barrett's improved properties. Further, the Borough presented no argument for entry upon any individual property owned by Barrett and established no probable cause for such action. And, the Borough presented no argument for entry upon Barrett's personal residence at 136 East High Street and established no probable cause for such action. The Borough did not establish probable cause for searching Barrett's properties, and the Trial Court did not issue Warrants.

On June 14, 1999, Barrett filed a Complaint in the United States District Court for the Middle District of Pennsylvania at Civil No. 1:CV-99-997. In the Federal Complaint, Barrett averred that the inspections ordered by the Trial Court constituted "searches" under the Fourth Amendment to the United States Constitution, were ordered without probable cause, and violated his right to be secure in his property against unreasonable searches. Barrett requested the U.S. District Court vacate the June 03, 1999 discovery order of the Trial Court. On June 27, 1999, the U.S. District Court dismissed the complaint for lack of jurisdiction.

On June 21, 1999, Barrett filed a Notice of Appeal to the Pennsylvania Commonwealth Court of the June 03, 1999 discovery order of the Trial Court. Barrett averred that his appeal was an Interlocutory Appeal as of Right made under Pa.R.A.P. 313, Collateral Orders. On July 19, 1999, the Commonwealth Court of Pennsylvania quashed Barrett's appeal on grounds that it was interlocutory and not otherwise appealable.

Barrett was subsequently incarcerated in the Cumberland County Prison under lock-down conditions for

forty-one (41) days for refusing to allow the searches. Only after Barrett agreed, under duress, to the searches was he released from prison.

Barrett was again incarcerated under lock-down conditions for another forty (40) days for refusing to allow warrantless searches of his papers and for refusing to answer interrogatories about his financial status.

Courts are not exempt from the provisions of the Fourth Amendment to the United States Constitution. Nor are discovery actions in lawsuits exempt from the provisions of the Fourth Amendment to the United States Constitution. Constitutionally protected areas, including property, papers, and effects, are subject to the protections guaranteed under the Fourth Amendment to the United States Constitution. Judicial discretion does not include the right to violate Constitutional protections. Barrett avers that the discovery "inspections" ordered by the Trial Court constituted "searches" subject to Fourth Amendment protections, which required a finding of probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. The Trial Court failed to issue warrants based on probable cause for the searches of Barrett's properties, and Barrett avers that the Trial Court, thereby, violated his right to be secure in his property and papers against unreasonable searches. As a consequence, Barrett's refusal to submit to violations of his Constitutional rights by the Trial Court does not establish a basis for civil contempt of court and his subsequent imprisonment.

IV. **The Court of Common Pleas of Cumberland County, Bayley, J., violated Petitioner's rights under the Fifth and Fourteenth Amendments in appointing an agent to take possession of and to sell Petitioner's improved properties.** (*See* Appendix C)

The Trial Court entered a default judgment against Barrett, which Amended Final Decree appointed an agent to take possession of and to sell Barrett's eight (8) improved properties in the absence of any factual evidence supporting the Borough's Complaint.

For years, the Borough has perjured itself before this Trial Court in an effort to regulate the simple appearance of Barrett's properties and to prevent Barrett from demolishing buildings within the Historic District in order to create adequate parking for tenants. The Borough has falsely claimed that Barrett's properties constitute public safety hazards, that properties would collapse, that windows would fall out, that firemen could fall from porches, that roofs would collapse, and that electrical explosions would occur. In fact, in over thirty (30) years of owning property in Carlisle, no one has ever been injured as a result of the condition of Barrett's properties and no tenant has ever filed a complaint concerning Barrett's properties. Most of the alleged violations against Barrett's properties were against buildings which Barrett had applied to demolish and been refused by the Borough. While refusing to issue Barrett demolition permits, the Borough continued to cite Barrett for property maintenance violations against the very buildings he was trying to demolish.

With respect to the personal and financial information which the Trial Court ordered Barrett to produce, there is no

requirement in law that Barrett have, maintain or make public any of the information demanded by the Trial Court:

a. There is no requirement in law that Barrett earn a specified annual income in order to own property.

b. There is no requirement in law that Barrett spend a specified amount of money to maintain his properties.

c. There is no requirement in law that Barrett have insurance for his property.

d. There is no requirement in law that Barrett have written leases.

e. There is no requirement in law that Barrett keep business records.

f. There is no requirement in law that Barrett keep receipts.

g. And there is no requirement in law that Barrett make any of the about information available to the public, the Borough, or the Trial Court.

The Building Officials and Code Administrators (BOCA) National Property Maintenance Code to which the Trial Court referred in its Opinion and Final Decree dated January 24, 2000 is intended to protect the public from fire, safety, and health hazards. The BOCA Code cannot lawfully be used to regulate the simple appearance of property.

The Borough, however, in collusion with the Trial Court uses the BOCA Code to unlawfully regulate the simple appearance of properties within the Historic District in the absence of public fire, safety or health hazards. Regulation of the simple appearance of property is a "taking" of property rights in violation of the Fifth and Fourteenth Amendments to

the United States Constitution.

The Trial Court exceeded its authority in appointing an agent to take and to sell Barrett's properties. The Trial Court's default judgment is based solely on Barrett's refusal to give up his Constitutional rights under the Fourth Amendment. The Trial Court failed to establish that the searches ordered were reasonable and that they were essential to the immediate action. The Borough admitted in its Complaint that no laws had been broken. The Borough further failed to establish that any harm had been done to the Historic District or to individual property owners. In fact, the thinning of properties within the Historic District is absolutely necessary to the viability of the Historic District. The significant loss of business in the downtown area is the direct result of lack of adequate parking, excessive real estate prices, and egregious Borough regulations.

The Trial Court in the immediate action and in related cases before it has taken the following actions:

(1) Colluded with the Borough to regulate the simple appearance of property within the Historic District;

(2) Denied a subpoena against the State Commission to produce its records of the alleged certification of the Historic District (*See* Appendices H and I);

(3) Denied judicial review of the alleged State certification of the Historic District;

(4) Denied that property owners have a right to due process of law before the historic certifying authority based on the Trial Court's incorrect interpretation of Penn Central Transportation

Company v. New York City;

(5) Denied review of the Historic District certification based on expiration of the statute of limitations in violation of Gains v. City of Tiburon;

(6) Violated Barrett's Fourth Amendment rights by ordering warrantless searches of his properties and papers;

(7) And taken Barrett's properties through appointment of an agent to take possession of and to sell his properties.

In a telling verbal exchange over objections to questioning between the Trial Judge and the Solicitor for the Borough at a hearing in a related State case, the Trial Judge stated as follows, "Don't forget that it was this Court that saved the Carlisle Historic District."

CONCLUSION

This case raises constitutional issues involving the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution and the decision of the United States Supreme Court in Penn Central Transportation Company v. New York City, 438 U.S. 104 (1978). These issues have been decided by the State Courts in a way probably not in accord with applicable decisions of the Supreme Court of the United States.

For the reasons set out, Petitioner prays that this petition for writ of certiorari be granted.

Respectfully submitted,

By: Robert H. Barrett

Robert H. Barrett
Appellant, pro se
136 East High Street
Carlisle, PA 17013
(703) 524-5949 or (717) 243-0989

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APPENDIX A

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

No. 692 M.D. Alloc. Dkt. 2000

Petition for Allowance of Appeal from Commonwealth Court

BOROUGH OF CARLISLE,
Respondent

v.

ROBERT H. BARRETT,
Petitioner

ORDER

PER CURIAM

AND NOW, this 8th day of January, 2001, the petition for allowance of appeal is denied.

APPENDIX B

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 423 C.D. 2000
SUBMITTED: May 12, 2000

BOROUGH OF CARLISLE

v.

ROBERT H. BARRETT,
Appellant

BEFORE: HONORABLE DORIS A SMITH, Judge
HONORABLE BONNIE BRIGANCE LEADBETTER, Judge
HONORABLE WILLIAM J. LEDERER, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE LEDERER

FILED: August 23, 2000

The issues presented are whether the Court of Common Pleas of Cumberland County (trial court) abused its discretion by entering a default judgment against Robert H. Barrett (Barrett) or in framing the content of the amended final decree. We hold that Barrett waived the issue of whether the trial court abused its discretion in entering a

default judgment by not raising the issue before us, and the trial court did not abuse its discretion in framing the content of the amended final decree. Thus, the order of the trial court is affirmed.

The relevant facts of this case are as follows. On July 22, 1998, the Borough of Carlisle (Borough) filed a complaint in equity against Barrett, the owner of eleven properties in the historic district of the Borough. The complaint was the result of years of refusal by Barrett to bring his properties into compliance with the Borough's BOAC Property Maintenance Code (Code) and Historic District regulations. The complaint avers that, commencing in 1992, the Borough cited Barrett on a continuous basis for well over one hundred and seventy (170) Code violations. Barrett had also unsuccessfully challenged the regulations in the Historic District Ordinance. See Barrett v. Borough of Carlisle, 707 A.2d 250 (Pa. Cmwlth. 1998), petition for allowance of appeal denied, 555 Pa. 714, 724 A.2d 350 (1998).

On October 7, 1999, Barrett was adjudicated in civil contempt for failing to comply with the trial court's order of June 3, 1999, which required him to answer interrogatories and produce documents. As a result, Barrett was committed to the Cumberland County Prison on October 13, 1999, with the condition that he might purge his contempt by complying with the order of June 3, 1999.[1] When Barrett continued to fail to comply with the discovery order, he was released from

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[1] Barrett was also imprisoned for civil contempt between July 7 and August 17, 1999, for failure to allow entry for inspection of the eight improved properties. He was released from prison when he finally complied with that requirement.

prison on November 22, 1999, and the following order was entered by the trial court:

> (1) If defendant fails to respond completely to the interrogatories and production of documents required by this court's order of June 3, 1999, not later than Wednesday, December 1, 1999, the following relief will be ordered:
>
> (a) a default judgment will be entered in favor of plaintiff and against defendant;
>
> (b) an agent will be appointed to manage defendant's eleven properties within the Historic District of the Borough of Carlisle in order to bring those properties into compliance with the Code and Historic District regulations;
>
> (c) an injunction will be issued prohibiting defendant from performing any repairs or alterations to any of his properties without first receiving certificates of appropriateness and building permits for such work;
>
> (d) the Borough will be awarded reasonable attorney fees in this action;
>
> (e) a further hearing will be conducted for the issuance of additional equitable relief necessary to effectuate the aforesaid provisions.
>
> (2) Defendant is released from his commitment to the Cumberland County Prison pursuant to the orders of October 7 and 13, 1999.

Barrett continued to ignore the trial court's June 3, 1999 order that he respond to the request for interrogatories and production of documents. On December 30, 1999, a hearing

was conducted for the purposes of entering a final decree. On January 14, 2000, the trial court entered default judgment against Barrett and in favor of the Borough. The trial court filed an amended final decree on January 24, 2000 granting the Borough the equitable relief it sought in its complaint, including the appointment of an agent to manage the eight improved properties owned by Barrett for the purpose of bringing those properties into compliance with Code and Historic District regulations. The amended final decree also awarded attorneys' fees against Barrett and in favor of the Borough. Barrett then filed an appeal with this Court.

On appeal,[2] Barrett acting pro se, does not argue that the trial court abused its discretion in entering the default judgment against him. Instead, he argues the underlying merits of the Borough's complaint against him. Barrett also argues that the final amended decree was not based on substantial evidence and that it violated his constitutional rights.

The trial court entered a default judgment against Barrett as a sanction for Barrett not complying with a discovery order. The decision to open a default judgment is left to the sound discretion of the trial court which must determine that: (1) the petition to open was promptly filed; (2) there was a reasonable excuse for the failure to comply; and (3) a meritorious defense is shown. Borough of Kennet Square v. Lal, 645 A.2d 747 (Pa. Cmwlth. 1994). In the case

[2] Our review in equity actions is limited to a determination of whether the trial court's findings of fact are supported by substantial evidence, whether an error of law has been made, or whether the trial court abused its discretion. King v. Township of Leacock, 552 A.2d 741 (Pa. Cmwlth. 1989).

at bar, Barrett never filed a petition to open the default judgment with the trial court. Nor does he argue on appeal that the trial court abused its discretion by entering the default judgment. Issues to which an appellant develops no argument and cites no authority are waived. Commonwealth v. Luktisch, 680 A.2d 877 (Pa. Super. 1996). Thus, the issue as to whether the trial court abused its discretion in entering the default judgment is waived.

Barrett does argue that the final amended decree issued by the trial court results in a constitutional "taking" of his property. In Borough of Kennet Square, however, this Court approved a similar remedy to force a property owner to bring his property into compliance with the borough's housing ordinance. We held that where an owner of an apartment complex receives hundreds of citations for violating the borough's housing ordinances, remedies at law are inadequate to insure the ordinances' enforcement and, thus, it was appropriate for the trial court to provide equitable relief in the form of an appointment of an agent to manage the apartment complex.

In the case at bar, the trial court clearly did not abuse its discretion by entering the final amended decree. The record is clear that Barrett is unwilling to cooperate with the Borough and bring his property into compliance with the Borough's codes and ordinances. Barrett was put on notice as to what would be the result of his continued disregard of the trial court's order and was given more than ample opportunity to comply with both the Borough and the trial court's reasonable requests. The final amended decree allows Barrett to retain ownership of this property and ensures that all properties will be brought into compliance. Barrett's

peripheral challenges to the final amended decree are without merit.

Accordingly, the order of the trial court is affirmed.

WILLIAM J. LEDERER, Senior Judge

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 423 C.D. 2000

BOROUGH OF CARLISLE

v.

ROBERT H. BARRETT,

Appellant

ORDER

AND NOW, this 23rd day of August, 2000, the order of the Court of Common Pleas of Cumberland County in the above-captioned matter is hereby affirmed.

WILLIAM J. LEDERER, Senior Judge

APPENDIX C

IN THE COURT OF COMMON PLEAS OF
CUMBERLAND COUNTY, PENNSYLVANIA

No. 98-4145 Equity Term

BOROUGH OF CARLISLE,
Plaintiff

v.

ROBERT H. BARRETT,
Defendant

AMENDED FINAL DECREE

AND NOW, this 24th day of January, 2000, the FINAL DECREE entered on January 14, 2000, **IS AMENDED:**

(1) A default judgment is entered in favor of plaintiff and against defendant.

(2) Judgment in the amount of $12,302.48 is entered in favor of plaintiff and against defendant for attorneys' fees.

(3) Defendant is enjoined from performing any repairs or alterations to any of his properties without (a) first receiving certificates of appropriateness and building permits for such work, and (b) the approval of this court to perform the work in lieu of it being performed by the hereinafter appointed agent.

(4) The Redevelopment Authority of the County of Cumberland is appointed agent to manage, for the purpose of

bringing into compliance with Code and Historic District regulations, the following eight improved properties of defendant in the Borough of Carlisle: (1) 29 South East Street; (2) 35 South Bedford Street; (3) 37 South Bedford Street; (4) 122 East Liberty Avenue; (5) 25 North Bedford Street; (6) 134 East High Street; (7) 136 East High Street; and (8) 138 East High Street.

(5) The agent shall post security in the amount of $1.00 with the Prothonotary.

(6) The following shall apply to the agent's performance of its duties:

(a) it shall have joint possession and control of the eight improved properties and defendant shall not in any way interfere with or obstruct the agent or anyone acting under its direction in the performance of its duties;

(b) for each property, it shall obtain two private bids itemizing the cost of repairs necessary to bring it into compliance with all Code and Historic District regulations;

(c) as the bids are received for each property, it shall forward both bids to defendant at his mailing address of 134 East High Street, Carlisle, PA 17013, by regular mail and also by certified mail, return receipt requested and restricted delivery;

(d) defendant shall have fifteen days from receipt of the certified mail, or ten days from the date of its return by the postal service as "unclaimed" or "refused," to deliver to the agent funds sufficient to pay for the amount of the lower bid;

(e) upon receipt of such funds from defendant in the amount of the lower bid, it shall have the work performed;

(f) should defendant fail to timely deliver such funds it may expend its own funds or it may arrange for financing for said work, and it may apply to the court to order that a mortgage lien be placed on defendant's property having sufficient equity to provide security for the debt incurred;

(g) after completion of the work, it shall send defendant by regular mail a statement of its costs;

(h) should defendant default in making timely payment of the repairs and costs within fifteen days of such mailing, the agent shall apply for an order of court for authorization to sell such property under terms and conditions approved by the court, and for an award of its costs;

(i) the costs can include: (1) any wages or other compensation of its staff and employees for time reasonably incurred in performing its duties; (2) invoices from any independent contractors retained to assist in the performance of its duties; (3) out-of-pocket expenses; (4) premiums for casualty and liability insurance for each property (unless defendant provides evidence of adequate coverages); (5) any deductibles incurred in defending any claims arising out of the performance of its duties; (6) any and all interest incurred by agent under its line of credit with Keystone Financial Bank or any other borrowing resulting from defendant's failure to make any payments in a timely

manner; (7) any legal fees incurred by agent in the performance of its duties; and (8) any other reasonable costs;

(j) should the proceeds of any sale exceed the cost of repairs and the agent's costs, the excess amount shall be retained and applied to repairs to other properties;

(k) in the event the agent obtains financing it may, with court approval, arrange to place a mortgage lien on the premises;

(l) the above procedure shall be followed with respect to each successive property although the agent may perform its duties concurrently on any of the eight properties;

(m) the agent shall respect the rights of any tenants, and to the extent possible all work should be performed without disturbing their peaceable possession;

(n) all tenants shall pay the agent all rent at the rate payable this date during the term of the performance of its duties, and the agent shall apply such rent to property repairs as authorized by this order;

(o) upon completion of its duties, the agent shall file an accounting with the Court as to all funds received and expenditures made;

(p) any funds remaining with the agent at the time of such accounting shall be distributed to defendant;

(q) defendant may file exceptions to the accounting;

(r) the agent may seek a judgment against

defendant for any deficiency in the amount paid for all repairs and all of its costs;

(s) the agent may petition to amend this order if necessary or desirable to effectuate its purpose.

(7) Defendant shall within seven days of the date of this order provide keys for all properties to agent.

(8) If defendant does not provide keys to the properties to agent, the agent may make forced entry into such property and change the locks.

(9) Within seven days of the date of this Order, defendant shall provide to agent copies of all current written leases as well as copies of any casualty and liability policies in effect, which policies shall be amended to name agent as an additional insured thereunder.

(10) Defendant shall hold agent harmless from any and all claims, costs, and expenses incurred by it in the proper performance of its duties.

(11) Upon application of plaintiff, the Court will consider an award of any additional attorney fees incurred.

(12) This court retains jurisdiction in equity for the enforcement of this order.

By the Court,

_____

Edgar B. Bayley, J.

APPENDIX D

IN THE COURT OF COMMON PLEAS OF
CUMBERLAND COUNTY, PENNSYLVANIA

No. 98-4145 Equity Term

BOROUGH OF CARLISLE, Plaintiff

v.

ROBERT H. BARRETT, Defendant

ORDER OF COURT

AND NOW, this 13th day of October, 1999, following a hearing, and pursuant to this court's order of civil contempt entered on October 7, 1999, and defendant having not purged himself of contempt as of this date, defendant is committed to the Cumberland County Prison until he complies with the order of October 7, 1999, which requires compliance with the order of June 3, 1999. Upon compliance defendant shall advise this judge in writing. The solicitor of the Borough of Carlisle shall then forthwith notify this court if he believes that there has been compliance. Counsel fees are awarded to the Borough of Carlisle in the amount of $981. Pursuant to the order of contempt of October 7, 1999, defendant shall pay such counsel fees in full not later than December 1, 1999.

By the Court,

_____

Edgar B. Bayley, J.

APPENDIX E

IN THE COURT OF COMMON PLEAS OF
CUMBERLAND COUNTY, PENNSYLVANIA

No. 98-4145 Equity Term

BOROUGH OF CARLISLE, Plaintiff

v.

ROBERT H. BARRETT, Defendant

ORDER OF COURT

AND NOW, this 7th day of July, 1999, I adjudicate you in civil contempt of court for violating this Court's inspection order of June 3, 1999. You are committed to the Cumberland County Prison until you purge yourself of contempt. You may purge yourself of contempt by advising me at any time that you will comply with the inspections as required by the order of June 3, 1999, and at that point I will then immediately set a new inspection schedule, and I will then have a sheriff take you to the first scheduled inspection, and if you comply with that inspection order, you may remain out of prison for as long as you continue to purge yourself of contempt by allowing all further inspections as scheduled. Defendant is to stand committed in civil contempt until the conditions of purge are met or he obtains a supersedeas from an Appellate Court.

By the Court,

_____

Edgar B. Bayley, J.

APPENDIX F

IN THE COURT OF COMMON PLEAS OF
CUMBERLAND COUNTY, PENNSYLVANIA

No. 98-4145 Equity Term

BOROUGH OF CARLISLE,
Plaintiff

v.

ROBERT H. BARRETT,
Defendant

PETITION TO VACATE AN ORDER OF COURT

NOW COMES Defendant, Robert H. Barrett (herein, "Barrett"), a *pro se* litigant, and requests your Honorable Court vacate the June 03, 1999 Order of Court in this action. In support thereof, Barrett avers the following:

1. Barrett is the owner of eleven (11) parcels of real estate situated within the Borough of Carlisle (herein, "the Borough"), Cumberland County, Pennsylvania. Eight (8) of the eleven (11) properties are improved with buildings.

2. The parcels of real estate are situated in what is known as the Carlisle Historic Preservation District (herein, "the Historic District").

3. On July 09, 1998, Barrett filed a lawsuit in the U.S. District Court for the Middle District of Pennsylvania at Civil No. 4:CV-98-1109 challenging the certification of the Historic District. The Federal Complaint is pending in U.S. District Court.

4. On July 22, 1998, in retaliation, the Borough filed the present lawsuit requesting that the Court appoint an agent to manage Barrett's eleven (11) properties within the Historic District.

5. On June 03, 1999 the Court issued an Order authorizing the Borough to search Barrett's eight (8) improved properties **without probable cause**, in violation of the Fourth Amendment to the United States Constitution. A copy of the Order is attached as Exhibit A.

6. The searches authorized by the June 03, 1999 Order are scheduled to commence on June 21, 1999 and continue through June 24, 1999.

7. The entry upon Barrett's properties authorized by the June 03, 1999 Order is "for the purpose of inspecting, measuring, photographing, videotaping, testing, sampling, or analyzing the said properties and all fixtures for code violations."

8. The "inspections" authorized by the June 03, 1999 Order are broad, unrestricted intrusions upon Barrett's properties and constitute "searches" under the Fourth Amendment to the United States Constitution.

9. Barrett avers that a separate search warrant is required for each property which sets forth the probable cause for the search, the nature of the evidence sought, and limiting conditions of the search.

10. The June 03, 1999 Order failed to identify the "code" against which the Borough is authorized to conduct its searches for violations.

11. The June 03, 1999 Order failed to state any

finding of probable cause against Barrett's properties collectively upon which to base searches of Barrett's properties.

12. The June 03, 1999 Order failed to state any finding of probable cause against Barrett's individual properties upon which to base a search of any individual property.

13. One (1) of the eight (8) properties to be searched is Barrett's personal residence at 136 East High Street, Carlisle.

14. The June 03, 1999 Order failed to state any finding of probable cause against Barrett's personal residence at 136 East High Street upon which to base a search of that property.

15. On the eight (8) properties authorized for search by the June 03, 1999 Order, four (4) have never been found in violation of any property maintenance code.

16. Of the eight (8) properties authorized for search by the June 03, 1999 Order, two (2) were cited for minor violations involving porch railings. One (1) of these properties is occupied, while the other is vacant. In both cases, access to the porches has been blocked, thereby eliminating any public safety hazard.

17. Of the eight (8) properties authorized for search by the June 03, 1999 Order, Barrett has been attempting to demolish three (3) of the buildings since February 1996, but has been prevented from doing so by the Borough.

18. And finally, of the eight (8) properties authorized for search by the June 03, 1999 Order, one is an old garage

condemned by the Borough as "likely" to collapse and repeatedly cited, in spite of the fact that (1) the building was never in danger of collapse, (2) no one has ever been hurt by the condition of the building, and (3) Barrett has invested tens of thousands of dollars in repairing the building, in spite of the Borough's repeated denial of building permits.

19. On June 01, 1999, the Cumberland County Court of Common Pleas heard on-record argument on the Borough's motion to compel compliance with their discovery requests, including the Borough's request for entry upon Barrett's properties.

20. Barrett has requested preparation of a transcript of the June 01, 1999 on-record argument.

21. At the June 01, 1999 on-record argument, the Borough presented no statement of facts or evidence against Barrett's properties to establish probable cause for general entry upon all eight (8) of Barrett's improved properties.

22. At the June 01, 1999 on-record argument, the Borough presented no argument for entry upon any individual property owned by Barrett and established no probable cause for such action.

23. At the June 01, 1999 on-record argument, the Borough presented no argument for entry upon Barrett's personal residence at 136 East High Street and established no probable cause for such action.

24. The Court violated the Fourth Amendment to the United States Constitution by authorizing the Borough to search Barrett's eight (8) improved properties without probable cause.

25. The Court violated the Fourth Amendment to the United States Constitution by authorizing a general, unrestricted search of Barrett's eight (8) improved properties.

AND FURTHER:

26. The June 03, 1999 Order overruled Barrett's objection to Interrogatory 5 which required insurance policy information on each of Barrett's properties. The Court has failed to identify the relevance of this information to any law or regulation governing the maintenance of Barrett's properties.

27. The June 03, 1999 Order overruled Barrett's objection to Interrogatory 14 which required information on the purchase price, current debt, monthly payments, names of occupants, reason structure is not occupied, and amounts spent on maintenance on each of Barrett's properties. The Court has failed to identify the relevance of this information to any law or regulation governing the maintenance of Barrett's properties.

28. The June 03, 1999 Order overruled Barrett's objection to Interrogatory 15 which required information on maintenance, repairs, improvements, betterment or demolition, and on whether building permits were applied for and issued for each of Barrett's properties. The Court has failed to identify the relevance of this information to any law or regulation governing the maintenance of Barrett's properties.

29. The June 03, 1999 Order overruled Barrett's objection to Production Request 6 which required all rental records, inclusive of income and expense statements for each of Barrett's properties. The Court has failed to identify the

relevance of this information to any law or regulation governing the maintenance of Barrett's properties.

30. The June 03, 1999 Order overruled Barrett's objection to Production Request 7 which required all records reflecting income, of any nature, and expenses for each of Barrett's properties. The Court has failed to identify the relevance of this information to any law or regulation governing the maintenance of Barrett's properties.

31. The June 03, 1999 Order overruled Barrett's objection to Production Request 11 which required copies of the declaration pages of each insurance policy applicable to each of Barrett's properties. The Court has failed to identify the relevance of this information to any law or regulation governing the maintenance of Barrett's properties.

WHEREFORE, Defendant, Robert H. Barrett, prays the Court issue an Order to Vacate an Order of Court issued June 03, 1999 in the present lawsuit, based on failure by Plaintiff, Borough of Carlisle, (1) to establish probable cause for entry upon Barrett's eight (8) improved properties, and (2) to establish the relevance of Interrogatories 5, 14, and 15 and of Production Requests 6, 7, and 11 to any law or regulation governing the maintenance of Barrett's properties.

Dated: June 14, 1999 By: _____

Robert H. Barrett
Defendant, *pro se*
134 East High Street
Carlisle, PA 17013

APPENDIX G

IN THE COURT OF COMMON PLEAS OF
CUMBERLAND COUNTY, PENNSYLVANIA

No. 98-4145 Equity Term

BOROUGH OF CARLISLE,
Plaintiff

v.

ROBERT H. BARRETT,
Defendant

OPINION IN SUPPORT OF ORDER DATED JUNE 3, 1999

Bayley, J., June 23, 1999:

On July 22, 1998, plaintiff, the Borough of Carlisle, instituted this equity action against defendant Robert H. Barrett. Based on a litany of alleged continuing Borough Code violations by Barrett who is the owner of eleven properties in the historic district of Carlisle, the Borough sought the following equitable relief:[1]

> A. **That an agent be appointed to manage Barrett's eleven properties within the historic district in order to bring the properties into compliance with the code and historic district**

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[1] The alleged violations and the extensive enforcement history are in detail averred in the Borough's seventy-three paragraph complaint.

regulations; and

B. That an injunction issue against Barrett prohibiting him from performing any repairs or alterations to any of his properties without first receiving certificates of appropriateness and building permits for such work; and

C. That the Borough be awarded its reasonable attorneys fees in this action, and all previous actions, between the parties; and

D. Such other equitable relief as the Court deems appropriate under the circumstances. (Emphasis added.)

Barrett filed preliminary objections to the complaint which were dismissed on February 9, 1999. This court was satisfied that plaintiff, pursuant to the **Borough of Kennet Square v. Lal**, 165 Pa. Commw. 573 (1994), has stated a complaint upon which a trial should be had on its claims for relief.

The Borough of Carlisle sought discovery in the form of answers to interrogatories and a motion to compel the production of documents. It also made a request to inspect the eight improved properties subject to this dispute. Defendant refused to allow the inspection of the properties and disputed much of the discovery requested. On June 3, 1999, following a hearing on plaintiff's motion to compel compliance with its requests, the following order was entered:

I. OBJECTIONS OF DEFENDANT TO PLAINTIFF'S INTERROGATORIES

1. Interrogatory No. 1. The objection **IS SUSTAINED** because the information sought is not relevant.

2. Interrogatory No. 2. The objection **IS SUSTAINED** except that defendant shall state his annual salary and any other income for the years 1996, 1997, 1998 and 1999 to date.

3. Interrogatory No. 5. The objection **IS OVERRULED**. Defendant shall answer this interrogatory in its entirety.

4. Interrogatory No. 7. Because defendant has identified only himself as an expert who will be called to testify, and he has answered the interrogatory with respect to himself, the objection **IS SUSTAINED**.

5. Interrogatory No. 10. The objection **IS SUSTAINED** because the information sought is not relevant.

6. Interrogatory No. 14. The objection **IS OVERRULED**. Defendant shall answer this interrogatory in its entirety.

7. Interrogatory No. 15. The objection **IS OVERRULED**. Defendant shall answer this interrogatory in its entirety.

8. Interrogatory No. 16. The objection **IS SUSTAINED** as the information sought is not relevant.

9. Interrogatory No. 17. The objection **IS SUSTAINED** as the information sought is not relevant.

10. All interrogatories that defendant is ordered to answer as set forth above shall be answered within twenty (20) days of this date.

II. PLAINTIFF'S MOTION TO COMPEL DEFENDANT TO COMPLY WITH PLAINTIFF'S REQUEST FOR PRODUCTION OF DOCUMENTS

1. Request No. 2. **IS DISMISSED** as overbroad.

2. Request No. 6. The motion **IS GRANTED.** Defendant shall provide plaintiff with such documents.

3. Request No. 7. The motion **IS GRANTED.** Defendant shall provide plaintiff with such documents.

4. Request No. 8. **IS DISMISSED** as not relevant.

5. Request No. 9. **IS DISMISSED** as defendant was issued any such permits by plaintiff who has knowledge of them.

6. Request No. 10. **IS DISMISSED** as overbroad.

7. Request No. 11. The motion **IS GRANTED.** Defendant shall provide such documents to plaintiff.

8. All documents that defendant is ordered to produce as set forth above shall be produced within twenty (20) days of this date.

III. REQUEST FOR INSPECTION OF IMPROVED PROPERTIES OF DEFENDANT AT 25 NORTH BEDFORD STREET, 35 SOUTH BEDFORD STREET, 37 SOUTH BEDFORD STREET, 122 EAST LIBERTY AVENUE, 134 EAST HIGH STREET, 136 EAST HIGH STREET, 138 EAST HIGH STREET, AND 29 SOUTH EAST STREET

1. The request for the inspection of the aforesaid improved properties, which is opposed by defendant, **IS GRANTED**.

2. A group of up to six people may enter said properties, those people being one borough representative, the borough solicitor, a photographer who may be a borough representative, a real estate appraiser, a structural engineer and a contractor.

3. The entry of each property shall be for the purpose of inspecting, measuring, photographing, videotaping, testing, sampling, or analyzing the said properties and all fixtures and for code violations.

4. Each inspection may last for up to three hours.

5. The inspection schedule shall be as follows:

a. The inspection of 25 North Bedford Street shall commence at 9:00 a.m., Monday, June 21, 1999.

b. The inspection of 35 South Bedford Street shall commence at 1:00 p.m., Monday, June 21, 1999.

c. The inspection of 37 South Bedford Street shall commence at 9:00 a.m., Tuesday, June 22, 1999.

d. The inspection of 122 East Liberty Avenue

shall commence at 1:00 p.m., Tuesday, June 22, 1999.

e. The inspection of 134 East High Street shall commence at 9:00 a.m., Wednesday, June 23, 1999.

f. The inspection of 136 East High Street shall commence at 1:00 p.m., Wednesday, June 23, 1999.

g. The inspection of 138 East High Street shall commence at 9:00 a.m., Thursday, June 24, 1999.

h. The inspection of 29 South East Street shall commence at 1:00 p.m., Thursday, June 24, 1999.

6. Defendant shall provide complete access to these properties by the inspectors and shall not interfere with said inspections.

7. This inspection schedule may only be altered upon agreement of both parties for their convenience.

On June 21, 1999, defendant filed an appeal to the Commonwealth Court of Pennsylvania, from the interlocutory order of June 3, 1999, complaining that the order allows "Plaintiff, Borough of Carlisle to search eight (8) of Defendant's improved properties without probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the things to be seized." Besides being an improper appeal from an interlocutory order[2] the order does not provide, as defendant maintains, for an illegal search of defendant's property or the seizure of anything. To the contrary, the order specifically

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[2] Interlocutory orders are not appealable as of right as they can only be appealed by permission. Pa. Rule of Appellate Procedure 1311; **Department of Transportation v. Lakeview Motel, Inc.**, 81 Pa. Commw. 262 (1984).

limits the entry of plaintiff's agents into defendant's property:

> [f]or the purpose of inspecting, measuring, photographing, videotaping, testing, sampling, or analyzing the said properties and all fixtures for code violations.[3]

The order was entered pursuant to Pa. Rules of Civil Procedure 4009.31 and 4009.32 that provide:

> **RULE 4009.31 ENTRY UPON PROPERTY FOR INSPECTION AND OTHER ACTIVITIES. GENERAL PROVISIONS**
>
> Any party may serve a request upon a party pursuant to Rule 4009.32 . . . to permit entry upon designated property in the possession or control of the party or person upon whom the request is served for the purpose of inspecting and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rules 4003.1 through 4003.6 inclusive.
>
> **RULE 4009.32 REQUEST FOR ENTRY UPON PROPERTY OF A PARTY**

---

[3] The Borough has filed a motion to hold Barrett in contempt of the order for failing to allow entry for the scheduled inspections at 25 North Bedford Street and 35 South Bedford Street on June 21, 1999. A Rule to show cause was issued with a hearing set for July 7, 1999. The effect of even a proper petition to file an interlocutory appeal pursuant to Pa. Rule of Appellant Procedure 1311 is not to stay the proceedings in the trial court unless it is so ordered by that court or the Appellate Court. Pa. Rule of Appellate Procedure 1313

(a) The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the original process upon that party. The request shall describe with reasonable particularity the property to be entered and the activities to be performed.

The conditions of the subject improved properties are relevant and admissible, and therefore within the scope of Pa. Rule of Civil Procedure 4003.1(a) and (b), and go to the heart of plaintiff's claim for equitable relief. Defendant apparently thinks that this is a criminal rather than a civil case.

June 23, 1999

Edgar B. Bayley

APPENDIX H

IN THE COURT OF COMMON PLEAS OF
CUMBERLAND COUNTY, PENNSYLVANIA

No. 98-4145 Equity Term

BOROUGH OF CARLISLE, Plaintiff

v.

ROBERT H. BARRETT, Defendant

ORDER OF COURT

AND NOW, this 23rd day of April, 1999, the motion of defendant to allow the issuance of a subpoena to the Pennsylvania Historical and Museum Commission, **IS DENIED.**[1]

By the Court

_____

Edgar B. Bayley, J.

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[1] 1. The issue is res judicata. **Barrett v. Borough of Carlisle**, 96-2446, May 5, 1997, aff'd 707 A.2d 250 (Pa. Commw. 1998), petition for allowance of appeal denied 724 A.2d 350 (Pa. 1998).

APPENDIX I

IN THE COURT OF COMMON PLEAS OF
CUMBERLAND COUNTY, PENNSYLVANIA

No. 98-4145 Equity Term

BOROUGH OF CARLISLE,
Plaintiff

v.

ROBERT H. BARRETT,
Defendant

MOTION TO ALLOW ISSUE OF A SUBPOENA AGAINST THE PENNSYLVANIA HISTORICAL AND MUSEUM COMMISSION

AND NOW, comes Defendant, Robert H. Barrett, *pro se*, and hereby files the following Motion to Allow Issue of a Subpoena Against the Pennsylvania Historical and Museum Commission (herein, "the State Commission"). An identical copy of Defendant's Subpoena is attached as Exhibit A.

1. Defendant moves the Court for an Order allowing the issue of a subpoena duces tecum against the State Commission for production of documents relating to the State Commission historic certification processes whereby the Carlisle Historic District was allegedly certified in 1975.

2. On March 29, 1999, Defendant served upon Plaintiff a Notice of Intent to Serve a Subpoena Pursuant to Rule 4009.21.

3. On April 01, 1999, Plaintiff filed Objections to

Subpoena Pursuant to Rule 4009.21.

4. Defendant avers that the State Commission denied him substantive and procedural due process protections of the Fifth and Fourteenth Amendments of the United States Constitution during State Commission historic certification processes whereby the Carlisle Historic District was allegedly certified in 1975.

5. As a consequence of the State Commission's denial of due process protections during historic certification processes, certification of the Carlisle Historic District is invalid.

6. Because the Carlisle Historic District is invalid, Plaintiff is without authority to regulate property based on its location within the Carlisle Historic District.

7. Under the substantive and procedural due process protections of the Fifth and Fourteenth Amendments of the United States Constitution, Defendant has the right to judicial review of the State Commission historic certification processes whereby the Carlisle Historic District was allegedly certified in 1975.

8. The decision of the United States Supreme Court in Penn Central Transportation Company v. New York City, 438 U.S. 104 (1978) does not deny substantive or procedural due process protections of the Fifth and Fourteenth Amendments of the United States Constitution to historic certification processes or to judicial review of those processes.

9. Plaintiff incorrectly objects to the Subpoena on grounds that the validity of the certification of the Carlisle Historic District is barred by the principle of *res judicata*.

Under Pennsylvania law, *res judicata* precludes a subsequent action when there has been a prior judgment on the merits and there is a concurrence of four conditions; (1) an identity of the thing sued upon; (2) an identity of the cause of action; (3) an identity of the persons and parties to the action; and (4) an identity of the quality or capacity of the parties suing or being sued. There is no identity of conditions (1), (2), and (4) between the present action and Case No. 98-2446 Civil Term, Cumberland County of Common Pleas cited by Plaintiff in their objections. Thus, the issues raised by Defendant are not barred by *res judicata.*

WHEREFORE, Defendant, Robert H. Barrett, prays the Court issue an Order to Allow Issue of a Subpoena Against the Pennsylvania Historical and Museum Commission in accordance with Pa.R.C.P. No. 4009.21(d)1. An identical copy of the Subpoena is attached as Exhibit A.

Dated: April 19, 1999 By: _____

Robert H. Barrett
Defendant, *pro se*
134 East High Street
Carlisle, PA 17013

IN THE COURT OF COMMON PLEAS OF
CUMBERLAND COUNTY, PENNSYLVANIA

No. 98-4145 Equity Term

BOROUGH OF CARLISLE,
Plaintiff

v.

ROBERT H. BARRETT,
Defendant

REQUEST OF ROBERT H. BARRETT FOR PRODUCTION OF DOCUMENTS DIRECTED TO PENNSYLVANIA HISTORICAL AND MUSEUM COMMISSION

PURSUANT to Pa.R.Civ.P. 4009.1, please provide legible copies of the following documents which may be in the possession, custody or control of the Pennsylvania Historical and Museum Commission or any of its designated representatives. Requested documents existed on or before October 1, 1975 and concern the alleged review by the Pennsylvania Historical and Museum Commission of the proposed Carlisle Historic District, which review culminated in the certification of the Carlisle Historic District on October 1, 1975, with the following exception. The alleged notification document or other record of the final certification decision by the Pennsylvania Historical and Museum Commission was created on or after October 1, 1975.

This Request for Production of Documents is deemed continuing and supplemental documents should be provided.

NOTE: As referred to in this Request, "documents" includes written, printed, typed, recorded or graphic matter, however produced or reproduced, including correspondence, telegrams, other written communications, electronic files, data processing storage units, tapes, contracts, agreements, notes, memoranda, analyses, projections, indices, work papers, studies, reports, surveys, diaries, calendars, films, photographs, diagrams, drawings, minutes or transcripts of meetings or hearings, or any other material in the possession, custody or control of the Pennsylvania Historical and Museum Commission, their former or present counsel, agents, employees, officers, insurers or any other persons acting on behalf of the Pennsylvania Historical and Museum Commission.

Requested documents include the following:

1. All documents existing on or before October 1, 1975 that describe and verify the procedures followed by the Pennsylvania Historical and Museum Commission during its alleged review of the proposed Carlisle Historic District, which review culminated in the certification of the Carlisle Historic District on October 1, 1975. Documents shall include written procedures, public notices, individual notifications of property owners, proofs of receipt, records or transcripts of public meetings or hearings, and any other relevant materials.

2. All documents existing on or before October 1, 1975 that describe and verify the criteria used by the Pennsylvania Historical and Museum Commission in their

alleged evaluation of the proposed Carlisle Historic District, which review culminated in the certification of the Carlisle Historic District on October 1, 1975.

3. All documents existing on or before October 1, 1975 that constitute the supporting evidence for the alleged certification decision by the Pennsylvania Historical and Museum Commission, which decision culminated in the certification of the Carlisle Historic District on October 1, 1975. Documents shall include correspondence, written or typed papers, expert or staff reports, technical analyses, surveys, property lists, pictures or photographs, maps, preservation plans, ordinances, records of hearings or meetings, and any other relevant materials.

4. All documents or other records created on or after October 1, 1975 that allegedly describe and verify the final decision by the Pennsylvania Historical and Museum Commission certifying the Carlisle Historic District in 1975.

Respectfully submitted,

Dated: March 29, 1999 By: _____

Robert H. Barrett
Defendant, pro se
134 East High Street
Carlisle, PA 17013

APPENDIX J

IN THE COURT OF COMMON PLEAS OF
CUMBERLAND COUNTY, PENNSYLVANIA

No. 98-4145 Equity Term

BOROUGH OF CARLISLE, Plaintiff
v.

ROBERT H. BARRETT, Defendant

REQUEST FOR ENTRY UPON PROPERTIES FOR INSPECTIONS AND OTHER ACTIVITIES

TO: Robert H. Barrett
134 East High Street
Carlisle, Pennsylvania 17013

AND NOW, this 26th day of March, 1999, pursuant to Pennsylvania Rule of Civil Procedure No. 4009.31, *et. seq.*, as amended, comes the Borough of Carlisle, by its Solicitor, Edward L. Schorpp, Esq., and requests the above named Defendant to permit entry upon the exterior and interior of the following designated real estate in the ownership, possession, and control of the Defendant for the purpose of inspecting, measuring, photographing, videotaping, testing, sampling, or analyzing the said properties and all fixtures and appurtenances located thereon or therein.

The real estate which is the subject matter of this request is located in the Borough of Carlisle, Cumberland County, Pennsylvania, and consists of the land and

improvements of the following properties:

(1) 25 North Bedford Street
(2) 35 South Bedford Street
(3) 37 South Bedford Street
(4) 122 East Liberty Avenue
(5) 134 East High Street
(6) 136 East High Street
(7) 138 East High Street
(8) 29 South East Street

Entry will commence on Tuesday, May 4, 1999, at 9:00 o'clock a.m. continuing through 4:30 o'clock p.m., prevailing time, and on succeeding days, during the same hours, until all properties have been fully inspected.

Entry will be made by officials and employees of the Borough of Carlisle, the Carlisle Borough Solicitor, a real estate appraiser, a structural engineer, a building contractor, and photographer/videographer, all of the foregoing to be selected by the Borough of Carlisle. During said entry and inspection, the value of each property, its structural integrity, and its costs of restoration shall be determined, and inspection shall include any other matter relevant to the above captioned proceedings.

March 26, 1999 By: _____

Edward L. Schorpp, Esq.
Solicitor, Borough of Carlisle
127 West High Street
Carlisle, Pennsylvania 17013

APPENDIX K

IN THE COURT OF COMMON PLEAS OF
CUMBERLAND COUNTY, PENNSYLVANIA

No. 98-4145 Equity Term

IN EQUITY

JURY TRIAL DEMANDED

BOROUGH OF CARLISLE,
Plaintiff

v.

ROBERT H. BARRETT,
Defendant

Plaintiff, through its attorney, hereby propounds the following Interrogatories to defendant pursuant to Pennsylvania Rule of Civil Procedure 4006 to be answered within thirty (30) days from service thereof. These Interrogatories shall be deemed to be continuing Interrogatories. If, between the time of your answer to said Interrogatories and the time of the trial of this case you, or anyone acting on your behalf, learns the identity and whereabouts of any other witnesses not identified in your said answers, or if you obtain or become aware of additional requested information not supplied in your answers, you shall promptly furnish the same to plaintiff's attorney by a supplemental answer.

For the purposes of these Interrogatories, "you" or

"your" refers to the defendant and his files, the defendant's insurance companies and the agents or representatives of the defendant and his files. "You" shall further include all persons on whose behalf defendant prosecutes this action and all persons who will benefit or be legally bound by the results of this action. Your answer to the Interrogatories shall reflect and contain the knowledge of all the above persons.

References to plaintiff and/or defendant shall be interpreted as singular or plural, depending upon the particular circumstances of each case.

The term "description" or "describe" as used herein shall mean that the defendant shall set forth the name and address of the author or originator, dates, title or subject matter, the present custodians of the original and of any copies and the last known address of each custodian. "Document" shall mean any written, printed, typed or other graphic matter of any kind, whether handwritten, typed or printed, whether distributed or undistributed. It shall include without limitation letters, memoranda, articles, studies, notebooks, diaries and notes, as well as all mechanical and electronic sound recordings or transcripts thereof in the possession or control of the defendants or known by them to exist. It shall also mean all copies of documents by whatever means made.

Answer each interrogatory in the space following the interrogatory. Supplemental sheets may be attached which require additional space. Please take notice that you are required to serve upon the undersigned your answers in writing within thirty (30) days pursuant to the Pennsylvania Rules of Civil Procedure. These Interrogatories are deemed continuing and supplemental answers should reasonably be

provided.

1. Please state your present residence address, present state of domicile, date of birth, marital status, social security number, and each of your residences for the past ten years giving the dates of residence at each.

ANSWER:

2. State the extent of your formal education, your place of employment, the name of your employer, your job classification, the nature of your employment, the telephone number of your immediate supervisor and his or her name, and your annual salary and other income for the past seven years.

ANSWER:

3. List the names and addresses of persons known or believed by you or any person acting on your behalf, to have any knowledge concerning the matters averred in the Complaint and Answer in this action, and with regard to each person, state:

(A) his or her name;
(B) his or her present mailing address;
(C) his or her present telephone number; and
(D) a summary of the knowledge this person is purported to have.

ANSWER:

4. List the names and addresses of each fact witness you intend to call to trial, and briefly summarize their anticipated testimony.

ANSWER:

5. Give the carrier name, policy number, and policy limits for each and every policy insuring each of the parcels of real estate owned by you in the Borough of Carlisle; also state the nature of coverages under each.

ANSWER:

6. State the name, address, and occupation of any person whom you expect to call as an expert witness at trial, and with regard thereto, state:

(A) the subject matter on which the expert is to testify;
(B) the facts and opinions to which the expert is to testify;
(C) a summary of the grounds of each opinion;
(D) the name of any report, memorandum, or transcript used to substantiate each opinion;
(E) any code, regulation, or standard, governmental or otherwise, alleged by the expert to have been or not been violated, in whole or in part;
(F) any standard scientific principle alleged by the expert to have been or not have been violated, in whole or in part;
(G) any standard manufacturing/construction principle alleged by the expert to have been or not have been violated, in whole or in part; and
(H) the date, name and author of any textbook, document, or other source relied upon by the expert in rendering his opinion and testimony.

ANSWER:

7. With regard to each individual you expect to call as an expert witness at trial, state the following:

(A) Date of birth;

(B) Name and address of present employer; and if self-employed, name and address of the business;

(C) Full formal educational background, with dates of attendance and degrees obtained;

(D) a list of all writings and/or documents of any kind prepared in whole or in part by the expert; and

(E) names and addresses of all persons, firms or corporations who have retained this expert in the past ten years to render a report or testify as an expert witness.

ANSWER:

8. Are you or anyone acting on your behalf in possession of, or know of the existence of, any photographs, blueprints, sketches, drawings, diagrams, or plans of the instrumentalities, locales, equipment, tools, buildings, structures, land or any other thing or matter involved or averred in the Pleadings in this case? If so, state:

(A) The nature of the document, the name(s) and address(es) of the person(s) preparing such document, and the date of its preparation;

(B) The name(s) and address(es) of the person(s) presently having possession or custody of each such document;

(C) The specific subject matter of the document;

(D) The date it was made or taken; and

(E) What the document purports to show, illustrate or represent.

ANSWER:

9. Have you or anyone acting on your behalf conducted any investigations of the matters averred in the

Complaint or Answer and which are the subject matter of the Complaint or Answer? If so, identify:

(A) Each person and the employer of each person who conducted any investigations;
(B) The dates of investigations; and
(C) All notes, reports or other documentation prepared during or as a result of the investigations, and the identity of the person(s) who have possession thereof.

ANSWER:

10. Have you ever been convicted of a crime? If so, state:

(A) The nature of the conviction; and
(B) The date and location of said conviction.

ANSWER:

11. Have you made any statement, whether in writing, tape recording, or otherwise, to any person(s) regarding any of the events referred to in the Complaint or Answer? If so, state;

(A) The name(s) and address(es) of the person(s) to whom such statement was made;
(B) The date of such statement;
(C) The form of the statement, i.e., written, oral, recording device, or stenographer;
(D) Whether such statement, if written, was signed; and
(E) The name(s) and address(es) of the person(s) presently having custody of such statement.

ANSWER:

12. If you, your attorneys or former attorneys, or other representatives know of any other individuals not previously named in the answers to these Interrogatories who may have knowledge regarding any aspect of the subject action of the investigation thereof or whom you may call at trial to testify regarding some aspect of the subject action, please state:

(A) the name and last known address and telephone number of each;

(B) a brief statement of the information which you believe each such individual to have;

(C) the circumstances by which said individual came to have any such knowledge;

(D) if there is a signed or recorded statement from each such individual, please identify who took the statement, the date the statement was taken, and attach a copy of each such statement to answers to these Interrogatories.

ANSWER:

13. Please identify all exhibits which you intend to offer at the trial of this matter and state the purpose for which each is offered.

ANSWER:

14. For each parcel of real estate situate in the Borough of Carlisle in which you have an ownership interest, state:

(A) whether such parcel is vacant or improved with a structure or structures and identify the type(s) of structure;

(B) the deed reference of your deed;

(C) the date of acquisition;

(D) the purchase price;

(E) whether or not it is encumbered by debt and identify the creditor, current unpaid balance owing, required monthly payment and record reference;

(F) whether the structure is occupied and by whom, and if not, the last date it was occupied during your ownership and by whom;

(G) the reason the structure is not occupied;

(H) the total sum you have spent for maintenance, repair, improvement or betterment, or demolition of such property since the date of your purchase; and

(I) if you removed, or caused to be removed, any structure on the parcel, state when the structure(s) were removed and the reason for removal.

ANSWER:

15. For each property identified in the foregoing Interrogatory, state the following:

(A) identify any work you performed on each property in the nature of maintenance, repairs, improvements, betterment or demolition;

(B) for each work identified in the preceding subsection, state whether or not you applied for any building permits to perform such work; and

(C) for each work identified in the preceding subsection, whether or not you obtained any building permits to perform such work.

ANSWER:

16. For each of the last seven calendar years list each

asset owned by you during each of said years, specifically identifying the asset and corresponding value.

ANSWER:

17. For each of the last seven calendar years, list each liability outstanding against you in each such year and the corresponding amount of such liability.

ANSWER:

These Interrogatories shall be deemed to be continuing. If between the time of your answers to these Interrogatories and the time of trial of this case, you or anyone acting on your behalf learn the identity and whereabouts of any other witness(es) not identified in your answers, or if you obtain or become aware of additional requested information not supplied in your answers, you shall promptly furnish same to the undersigned by supplemental answers.

Dated: January 7, 1999

_____

Edward L. Schorpp, Esq.

APPENDIX L

IN THE COURT OF COMMON PLEAS OF
CUMBERLAND COUNTY, PENNSYLVANIA

No. 98-4145 Equity Term

IN EQUITY

JURY TRIAL DEMANDED

BOROUGH OF CARLISLE,
Plaintiff

v.

ROBERT H. BARRETT,
Defendant

REQUEST OF BOROUGH OF CARLISLE FOR PRODUCTION OF DOCUMENTS DIRECTED TO ROBERT H. BARRETT

TO: Robert H. Barrett
Pro Se

PURSUANT to Pa. R.C.P. 4009, please furnish at our office, on or not later than thirty (30) days after service of this Request, a photostatic copy or like reproduction of the following materials concerning this action or its subject matter which are in your possession, custody or control.

1. All photographs in the possession, custody or control of the Defendant, or any other person acting on behalf of the Defendant, including any insurers, showing,

representing or purporting to show any locales, land, structures, instrumentalities, and any and all other matters related to the subject matters of this litigation.

2. All diagrams, sketches, drawings, plans, measurements, or blueprints in the possession, custody or control of Defendant, or any other person or entity acting on behalf of said Defendant, including any insurer showing, representing, or purporting to show any of the instrumentalities, locales, structures or other matters involved in the matters averred in the Complaint.

3. All statements, signed statements, transcripts of recorded statements or interviews, recorded statements, or any statement of recorded statements, if not transcribed verbatim, taken of any parties, persons, or witnesses as part of an investigation of the matters averred in Plaintiff's Complaint and Defendant's Answer, conducted by, or in the possession of, Defendant, insurers, or anyone else acting on behalf of Defendant.

4. All expert opinions, reports, summaries, or other writings of experts in the possession, custody or control of Defendant, or insurers, which relate to the subject matter of this litigation.

5. All documents prepared by Defendant, or by any insurers, representatives, agents or anyone acting on behalf of Defendant during an investigation of any aspect of any of the matters raised in the Complaint or Answer in this action. Such documents shall include any documents made or prepared up through the present time, with the exclusion of the mental impressions, conclusions, or opinions respecting the value or merit of a claim or defense, or respecting

strategy or tactics.

(**NOTE:** As referred to therein, "documents" includes written, printed, typed, recorded or graphic matter, however, produced or reproduced, including correspondence, telegrams, other written communications, data processing storage units, tapes, contracts, agreements, notes, memoranda, analyses, projections, indices, work papers, studies, reports, surveys, diaries, calendars, films, photographs, diagrams, drawings, minutes of meetings or any other writing [including copies of the foregoing, regardless of whether the parties to whom this request is addressed is now in the possession, custody or control of the original] now in the possession, custody or control of Defendant, his former or present counsel, agents, employees, officers, insurers, or any other persons acting on Defendant's behalf.)

6. All written rental records, inclusive of income and expense statements, for each of the properties owned by Defendant in the Borough of Carlisle.

7. All records reflecting all income, of any nature whatsoever, and all expenses relating to each of the properties owned by you in the Borough of Carlisle during your period of ownership.

8. Copies of your complete personal income tax returns, both federal and state, for the past seven years.

9. Copies of all building permits obtained by you relating to each property owned by you in the Borough of Carlisle during your period of ownership.

10. All financial statements prepared during the last

seven years which reflect the total value of your assets and liabilities for any period during said seven year period.

11. Copies of the declaration pages of each policy of insurance applicable to each parcel of real estate owned by you in the Borough of Carlisle.

Respectfully submitted,

Dated: January 01, 1998 By: _____

Edward L. Schorpp, Esq.
I.D. No. 17495
Solicitor for the Borough of Carlisle
127 West High Street
Carlisle, Pennsylvania 17013

APPENDIX M

IN THE COURT OF COMMON PLEAS OF
CUMBERLAND COUNTY, PENNSYLVANIA

No. 98-4145 Equity Term

BOROUGH OF CARLISLE, Plaintiff

v.

ROBERT H. BARRETT, Defendant

ANSWER TO COMPLAINT

AND NOW, comes Robert H. Barrett, pro se, and files this Answer to Complaint and, in support of dismissal thereof, answers as follows:

1. Admitted.

2. Admitted in part and denied in part. It is admitted that Defendant, Robert H. Barrett, uses the address of 134 East High Street, Carlisle, Pennsylvania for the purpose of receiving mail. Defendant denies that the address of 134 East High Street, Carlisle, Pennsylvania is used for purposes other than to receive mail.

3. Denied. It is denied that Defendant has claimed to be a resident of the Borough of Carlisle. It is further denied that Defendant is a resident of the Commonwealth of Virginia.

4. Admitted.

5. Admitted in part and denied in part. It is admitted

that the Historic Preservation District (herein, "the Historic District") established by the Borough of Carlisle (herein, "the Borough") in August 1975 is for naming purposes, only. It is denied that the Historic District established by the August 1975 ordinance conveyed lawful authority to the Borough to regulate property based on its location within the Historic District.

6. Admitted in part and denied in part. It is admitted that the Borough attempted to incorporate Historic District regulations into its zoning regulations in 1988. It is denied that Historic District regulations are properly incorporated in the Borough's zoning regulations. Zoning regulations properly involve the "use" of property, while Historic District regulations attempt to regulate the simple "appearance" of property independent of its use.

7. Admitted.

8. Admitted in part and denied in part. It is admitted that Defendant owns two (2) properties at 25 and 29 South East Street which are zoned residential. It is denied that each of there residential properties has buildings situated thereon. Defendant avers that the property at 25 South East Street is a vacant lot seeded in grass, has no buildings situated thereon, and is not used for any public purpose. Defendant further avers that the property at 29 South East Street has situated thereon a single family house occupied by tenants.

9. Admitted in part and denied in part. It is admitted that Defendant owns properties at 118, 122, and 141-143 East Liberty Avenue which are zoned residential. It is denied that each of these residential properties has buildings situated thereon and that such buildings are accessible to persons

other than the Defendant. Defendant avers that the property at 118 East Liberty Avenue is a parking lot and has no buildings situated thereon. Defendant avers that the property at 122 East Liberty Avenue has situated thereon a single family row house, has been continuously vacant since 1993, and is not accessible to persons other than the Defendant. Defendant avers that the property at 141-143 East Liberty Avenue is a parking lot and seeded lawn, and that the property has no buildings situated thereon.

10. Admitted in part and denied in part. It is admitted that Defendant owns three (3) properties at 25 North Bedford Street, 35 South Bedford Street, and 37 South Bedford Street. It is admitted that the property at 25 North Bedford Street is zoned commercial and that the properties at 35 and 37 South Bedford Street are each zoned residential. It is denied that each of the buildings situated thereon are accessible to persons other than the Defendant. Defendant avers that the property at 25 North Bedford Street has situated thereon a large brick garage/warehouse. Defendant avers that each of the properties at 35 South Bedford Street and at 37 South Bedford Street has situated thereon a multi-family row house. Defendant avers that the property at 35 South Bedford Street is occupied by tenants. Defendant avers that the property at 37 South Bedford Street has been continuously vacant since 1990 and that the building is not accessible to persons other than the Defendant. Defendant avers that the commercial property at 25 North Bedford Street is not accessible to persons other than the Defendant.

11. Admitted in part and denied in part. It is admitted that Defendant owns property at 134, 136, and 138 East High Street each of which is zoned residential. It is denied that

any of these buildings is occupied or accessible to persons other than the Defendant. Defendant avers that each of these three (3) properties has erected thereon a row house. Defendant avers that he occupies the house at 136 East High Street and that the houses at 134 and 138 East High Street are vacant.

12. Admitted in part and denied in part. It is admitted that the Borough has cited Defendant's properties for public safety hazards and that the Court has dismissed the majority of these citations. It is denied that Defendant has been found guilty of numerous violations. Defendant avers that most of the citations were against the garage/warehouse at 25 North Bedford Street and were caused by severe wind damage to the roof and to damage caused by a car accident in which a car ran into the building.

13. Admitted in part and denied in part. It is admitted that in June of 1979, Defendant's property at 118 East Liberty Avenue suffered fire damage. It is denied that the fire resulted from any lack of maintenance or repair on the part of Defendant. Defendant avers that based on the police report, the tenant of the property was intoxicated and fell asleep while smoking on a couch in the livingroom.

14. Admitted in part and denied in part. It is admitted that Defendant did not repair the fire damaged building to its previous condition. It is denied that Defendant did nothing to the fire damaged building. Defendant avers that he removed the fire damaged contents of the building and secured the building.

15. Denied. It is denied that Defendant was prosecuted prior to demolition of the building at 118 East

Liberty Avenue for commencing demolition without a building permit. Defendant avers that he attempted to obtain a permit to demolish the fire damaged building at 118 East Liberty Avenue, but was denied a permit by Borough officials.

16. Admitted in part and denied in part. It is admitted that Defendant demolished the structure at 118 East Liberty Avenue. It is denied that the Borough ever issued a demolition permit for the building. Defendant avers that following the Borough's refusal to issue a demolition permit for the fire damaged building at 118 East Liberty Avenue, Defendant demolished the building.

17. Admitted.

18. Admitted in part and denied in part. It is admitted that Defendant gutted the interior of the building at 25 South East Street. It is denied that Defendant gutted the building without the required approvals. It is denied that Defendant stored debris from the gutted house in the garage at 25 North Bedford Street. Defendant avers that he applied for two (2) building permits for the property at 25 South East Street, which at that time had erected thereon a multi-family frame house. One (1) permit was to demolish the structure. The second permit was to gut the interior of the building which would have to be done independent of whether the building was demolished or remodeled. The Borough denied the permit to demolish the structure, but approved the permit to gut the inside of the building. Plaster debris from gutting the house was thrown into the cellar of the building as fill, wood debris was burned in a wood stove, and non-flammable material was hauled to a dump.

19. Denied. It is denied that gutting the house had any structural effect on the house. It is denied that gutting the house made the house economically unfeasible to repair. Defendant avers that a primary purpose for gutting a house is to allow inspection of its structural members and internal systems to determine the feasibility of making repairs. Defendant avers that gutting the house involved removed plastering, floor coverings, wiring, plumbing, heating ducts, and non-bearing internal walls which had no structural effect on the house Gutting the house uncovered structural problems which existed before the house was gutted. The main sills of the house on which the wall studs rested were found to be badly deteriorated. The economic feasibility of repairing the house was also not effected by gutting the house. In order to make repairs to the house, the house would still have to be gutted in order to remove the old materials.

20. Denied. It is denied that Defendant's action in gutting the house was intended to make the building structurally deficient and economically unfeasible.

21. Admitted in part and denied in part. It is admitted that Borough Council eventually granted Defendant approval to demolish the house and that Defendant did demolish the house. It is denied that Defendant initiated a second action to demolish the house and that Borough Council reluctantly granted the request. Defendant avers that the Borough asked Defendant to submit a second request which it assured Defendant would be approved.

22. Admitted in part and denied in part. It is admitted that Defendant owns a garage at 25 North Bedford Street. It is denied that Defendant uses the garages to store debris or

other trash. Defendant avers that he has salvaged some reusable framing and form lumber from demolished buildings which he has used in the repair of the garage at 25 North Bedford Street and other properties.

23. Admitted in part and denied in part. It is admitted that the Borough's sent Defendant notice of "codes violations." It is denied that any of the "codes violations" actually constituted a public safety hazard.

24. Denied. It is denied that the roof of the garage at 25 North Bedford Street fell into any further disrepair. Defendant avers that the only damage to the roof resulted when a severe wind tore the sheet metal covering the roof loose at the front edge and rolled the sheet metal over the top of the roof and onto the back side. Removing the sheet metal covering from the front of the roof did no structural damage to the roof, but did allow water to enter the building.

25. Admitted with qualification. It is admitted that Defendant was eventually found guilty on these citations following appeal to the Commonwealth Court which vacated the Common Pleas Court's original decision. The Commonwealth Court sent the case back to the Common Pleas Court for failure to identify what Defendant had been convicted of.

26. Admitted with qualification. It is admitted that the Court found Defendant guilty on the citations. Defendant avers that in spite of the fact that Defendant had applied for a permit to demolish the house at 25 South East Street and had been denied the permit by the Borough, the Borough continued to cite Defendant for public safety hazards based on the condition of the house. Further, Defendant avers that

at 29 South East Street, Defendant was cited for a missing railing on a second floor porch, in spite of the fact that the porch was inaccessible from the ground without a ladder and that the door to the porch was locked.. The Borough argued that if there was ever a fire in the building, a fireman might fall off the porch.

27. Admitted with qualification. It is admitted that the Commonwealth Court eventually upheld the convictions on the citations. Defendant avers that in spite of the Borough's repeated claims that Defendant's properties constitute public safety hazards, no one has ever been injured as a result of the condition of Defendant's properties in the twenty-eight (28) years that Defendant has owned property in Carlisle.

28. Admitted with qualification. It is admitted that the Common Pleas Court affirmed the condemnation of the garage at 25 North Bedford Street based solely on review of procedural aspects of the case. Defendant avers that the Court did not review the technical determinations as to whether the garage actually constituted a public safety hazard. Defendant further avers that in spite of the Borough's predictions that the roof of the garage and one of the exterior walls was "likely" to collapse, the building has not collapsed and is in no danger of collapse.

29. Admitted with qualification. It is admitted that the condemnation order was dismissed by the Commonwealth Court for failure by Defendant to go forward with the appeal. The Commonwealth Court never heard the case.

30. Admitted in part and denied in part. It is admitted

that the Court twice found Defendant to be in contempt of the condemnation order. On October 05, 1995, Defendant was found guilty of refusing to allow a group of six (6) Borough employees to enter the garage at 25 N. Bedford Street, unannounced, and for the purpose of simply looking around. On September 09, 1996, Defendant was found guilty of storing equipment and materials in the garage and for working in the garage. It is denied that the garage was a hazard either to the public or to the Defendant. It is denied that condemnation of the building was justified.

31. Admitted in part and denied in part. It is admitted that on October 11, 1996, the Borough filed sixty (60) citations against Defendant for three (3) specific conditions at the garage at 25 North Bedford Street. It is denied that these conditions violated the Building Officials and Codes Administrators (BOCA) Code.

32. Admitted with qualification. It is admitted that on July 24, 1997, the Court found the Defendant guilty on twenty (20) citations and not guilty on forty (40) citations.

33. Admitted in part and denied in part. It is admitted that the Court exercised its discretion in the administration of justice and imposed less than the maximum fines allowed against Defendant. It is denied that the Court "expressly found that there was sufficient evidence to find Barrett guilty beyond a reasonable doubt on all of the citations."

34. Admitted in part and denied in part. It is admitted that to date, Defendant has paid part but not all of the 1997 fines imposed. It is admitted that to date the Defendant has made more than $55,000 in repairs to the garage. It is denied that necessary repairs to the garage have not been made.

35. Admitted in part and denied in part. It is admitted that Defendant periodically receives correspondence from Borough officials identifying purported violations of the BOCA Code by Defendant's properties. It is denied that these purported violations do, in fact, constitute a public fire, health, or safety hazard.

36. Admitted in part and denied in part. It is admitted that the Court found Defendant guilty on three (3) citations and not guilty on three (3) citations at No. 95-0546 Criminal Term. It is denied that any of the property conditions identified constituted a public safety hazard, particularly since two (2) or the three (3) properties involved were vacant and the third property involved a missing railing on a porch which could only be accessed with a twenty (20) foot ladder.

37. Admitted.

38. Admitted in part and denied in part. It is admitted that on February 12, 1996, Defendant applied to the Borough for a permit to demolish the single building deeded as 134, 136, and 138 East High Street. It is denied that this building is situated in a lawfully designated historic district established under Pennsylvania Act 167 of June 13, 1961.

39. Admitted in part and denied in part. It is admitted that the Carlisle Historical Architectural Review Board (herein, "the HARB") recommended to Carlisle Borough Council (herein, "Borough Council") that Defendant's demolition permit be denied. Defendant has no knowledge of any written opinion provided by the HARB to Borough Council.

40. Admitted.

41. Admitted in part and denied in part. It is admitted

that Borough Council voted to deny Defendant a demolition permit for the properties at 134, 136, and 138 East High Street. It is denied that a full and complete hearing was conducted on the matter and the issues raised by Defendant. Further, it is denied that Borough Council determined that the buildings were structurally sound.

42. Admitted in part and denied in part. It is admitted that the Common Pleas Court at No. 96-2446 Civil Term (1) denied Defendant's request for a complete review of the case, (2) denied Defendant's request for access to the records of the Pennsylvania Historical and Museum Commission which allegedly certified the Carlisle Historic District, and (3) dismissed Defendant's appeal of the decision of the Carlisle Borough Council denying the demolition permit. It is denied that the Court affirmed the Borough Council's decision.

43. Admitted.

44. Admitted with qualification. It is admitted that on June 09, 1998, Defendant's request to the Pennsylvania Supreme Court to hear his appeal was denied without comment.

45. Admitted in part and denied in part. It is admitted that on July 09, 1998, Defendant filed a lawsuit in the U.S. (Federal) District Court for the Middle District of Pennsylvania against the Borough of Carlisle and against the Pennsylvania Historical and Museum Commission over the Carlisle Historic District. It is denied that Defendant made the identical claims in the Federal lawsuit as those in the state courts.

46. Denied. It is denied that East High Street properties other than 138 East High Street have been found in

violation of the BOCA Code by the Court. It is denied that Defendant has refused to remove the front porch of 138 East High Street which was determined by the Court to be a public safety hazard. To the contrary, the Borough requested and were granted a Preliminary Injunction by the Court to prevent him from removing the front porch of 138 East High Street which the Borough had previously cited as a public safety hazard. Further, Borough officials have denied Defendant a permit to remove the front porch.

47. Admitted with qualification. It is admitted that the District Justice found the Defendant guilty of 158 property maintenance code violations (1) at the North Bedford Street garage to which Defendant has already made $55,000 in repairs and (2) at 138 East High Street which Defendant has been attempting to demolish since February 1996. On appeal to the Common Pleas Court, Defendant was found guilty on four (4) citations and not guilty on one hundred and fifty-four (154) citations.

48. Admitted with qualification. It is admitted that on May 11, 1998, Defendant applied for a building permit to rebuild an existing garage door opening at 25 North Bedford Street. Because Carlisle's Historic District was certified in violation of the Fifth Amendment of the United States Constitution, its status is limited to that of a named area. As such, compliance with recommended standards for historic preservation is strictly voluntary.

49. Admitted in part and denied in part. It is admitted that the Borough sent Defendant a letter dated May 20, 1998 giving their reasons for denying the building permit. It is denied that the reasons cited by the Borough for denying the permit are valid.

50. Admitted with qualification. It is admitted that Defendant commenced to perform the work in order to continue building repairs mandated by the Borough in order to eliminate alleged public safety hazards.

51. Admitted.

52. Admitted in part and denied in part. It is admitted that Defendant provided the Borough with additional technical information concerning the sizing of steel members to be used in rebuilding the garage door opening. See response to allegation No. 48.

53. Admitted in part and denied in part. It is admitted that Defendant continued to work on rebuilding the garage door opening. It is denied that the permit would have been of any benefit in the construction effort.

54. Admitted with qualification. It is admitted that Defendant continues to make repairs to the garage at 25 North Bedford Street. Defendant attempts to obtain building permits, in spite of continuing harassment from Borough officials.

55. Admitted with qualification. It is admitted that Defendant received a letter from the Borough dated July 17, 1998 in which Borough officials continued their harassment by again rejecting Defendant's permit application.

56. Denied. It is denied that "on numerous prior instances Barrett has commenced exterior work without securing the necessary approvals."

57. Denied. It is denied that Defendant is always fully aware of the Borough's requirements with respect to

building permits and historic district Certificates of Appropriateness. The Borough's bureaucratic propensity to change procedures and forms and the secrecy of its deliberations (i.e., the alleged certification of the Historic District, etc.) make it impossible for average citizens to know what rights they have left.

58. Denied. It is denied that only one of Defendant's properties is fit for human habitation. It is denied that the Borough has condemned any of Defendant's property other than the garage at 25 North Bedford Street.

59. Denied. It is denied that any of Defendant's properties, other than the house at 138 East High Street, may violate the BOCA Code. It is further denied that any of Defendant's properties, other than the house at 138 East High Street, may eventually become a public safety hazard.

60. Denied. It is denied that Defendant has vowed not to comply with regulations of any lawfully established historic district.

61. Admitted in part and denied in part. It is admitted that the Borough sends the Defendant notices about monies owed and about how Borough officials intend to regulate Defendant's properties. It is denied that the Borough or the Pennsylvania Historical and Museum Commission ever gave the Defendant or other property owners Fifth Amendment due process protections in the alleged Historic District certification process.

62. Denied. It is denied that Defendant refuses to repair his properties within the Historic District. Defendant has made tens of thousands of dollars in improvements and repairs to his properties.

63. Denied. It is denied that Defendant is responsible for money spent by the Borough in its unlawful attempt to regulate the simple appearance of property in Carlisle. Defendant has no knowledge of the amount spent by the Borough in unlawful actions.

64. Denied. It is denied that Defendant has exhibited any pattern of not abiding by lawful regulation. It is denied that Defendant's properties are in an unacceptable condition.

65. Denied. It is denied that the Borough has sufficient information or qualified staff to evaluate the economic feasibility of restoring old buildings as evidenced by their inability to predict the performance of a single building such as the garage at 25 North Bedford Street.

66. Denied. It is denied that the Defendant has done anything other than try to protect himself from attempts by the Borough to take Defendant's property rights and vest property control in the hands of Borough officials.

67. Denied. It is denied that the Defendant has undertaken a coordinated plan to blight the Borough's Historic District.

68. Denied. It is denied that Defendant is an absentee owner, is not available, and is unwilling to make improvements and repairs to his properties.

69. Denied. It is denied that the Court has upheld BOCA Code violations against the present condition of Defendant's properties except against two (2) properties, the front porch at 138 East High Street and the garage at 25 North Bedford Street.

70. Admitted in part and denied in part. It is admitted

that the Borough has been attempting to enforce its unlawful Historic District regulations for more than five (5) years. It is denied that imposing unlawful regulations on all its citizens thereby makes it lawful.

71. Denied. It is denied that Defendant's removal of some buildings within the over-built Historic District has had a deleterious effect on surrounding properties. It is denied that Defendant's actions have caused harm to citizens of the Historic District.

72. Denied. It is denied that the Borough may lawfully take property rights through administrative or regulatory procedures other than through eminent domain proceedings.

73. Denied. It is denied that government can "take" property through equity jurisdiction.

WHEREFORE, Defendant, Robert H. Barrett respectfully requests your Honorable Court to enter an Order to:

A. Dismiss the Complaint; and

B. Lift the Preliminary Injunction against the property at 138 East High Street.

Dated: December 22, 1998 By: _____

ROBERT H. BARRETT
Defendant, *pro se*
134 East High Street
Carlisle, PA 17013

APPENDIX N

IN THE COURT OF COMMON PLEAS OF
CUMBERLAND COUNTY, PENNSYLVANIA

No. 98-4145 Equity Term

IN EQUITY

JURY TRIAL DEMANDED

BOROUGH OF CARLISLE, Plaintiff

v.

ROBERT H. BARRETT, Defendant

COMPLAINT

NOW, COMES the Plaintiff, Borough of Carlisle, by and through its Solicitor, Edward L. Schorpp, Esq., and requests equitable relief against Defendant, Robert H. Barrett, as follows:

1. Plaintiff Borough of Carlisle (herein, Borough) is an incorporated municipality and political subdivision of the Commonwealth of Pennsylvania with its principal offices at 53 W. South St., Carlisle, Cumberland County, Pennsylvania.

2. Defendant Robert H. Barrett (herein, Barrett) is an adult individual having an address of 134 East High Street, Carlisle, Cumberland County, Pennsylvania.

3. Although Barrett claims to be a resident of the Borough, it believes, and therefore avers, that Barrett is a resident of the Commonwealth of Virginia.

4. This action concerns real estate owned by Barrett, all of which is situated in the Borough of Carlisle, Cumberland County, Pennsylvania.

5. On August 14, 1975, the Borough established an Historic Preservation District (herein, "historic district") by Ordinance No. 1197.

6. On September 22, 1988, by Ordinance No. 1600, the Borough adopted comprehensive zoning regulations which incorporated substantially all of the text of the historic district as previously ordained.

7. Barrett is the owner of record of eleven properties located within the Borough of Carlisle historic district.

8. Barrett owns two residential properties on South East Street, numbers 25 and 29.

9. Barrett owns three residential properties on East Liberty Avenue, numbers 118, 122 and 141.

10. Barrett owns three properties on Bedford Street, 25 North Bedford Street, a commercial property, and numbers 35 and 37 South Bedford Street, both residential properties.

11. Barrett owns three properties on East High Street, numbers 134, 136, and 138.

12. Barrett has been found guilty of numerous violations of the Borough of Carlisle Property Maintenance Code (herein, "Code"), all related to the inadequate maintenance and repair of his properties.

13. In June of 1979, Barrett's property at 118 East Liberty Avenue suffered fire damage.

14. Barrett did not repair the fire damage.

15. In 1984, Barrett was prosecuted twice for commencing the demolition of the structure at 118 East Liberty Avenue without a required building permit.

16. Barrett eventually obtained a building permit and the structure at 118 East Liberty Avenue was demolished.

17. In 1992, Barrett filed a request with the Borough Council for a Certificate of Appropriateness and a building permit to demolish the structure at 25 South East Street, which request was denied.

18. Without the required approvals, Barrett proceeded to gut the interior of the structure at 25 South East Street, piece by piece, and stored the debris in the large garage structure he owns at 25 North Bedford Street.

19. Because it was intentionally gutted, the South East Street building became structurally deficient and economically unfeasible to repair.

20. Barrett intended to make this building structurally deficient and economically unfeasible to repair so that Borough Council would have no choice but to allow its demolition.

21. Thereafter, upon Barrett's second request, Borough Council reluctantly granted the approvals and Barrett demolished the building.

22. Barrett owns a garage structure at 25 North Bedford Street which he has used to store debris from the dismantling of his other properties in the historic district.

23. In 1984, Borough Code Enforcement Officer, Dwain McLaughlin, forwarded written correspondence to

Barrett detailing code violations at his various properties, including 25 North Bedford Street.

24. Thereafter, the roof at 25 North Bedford Street fell into further disrepair and additional code violations became apparent.

25. In 1993, Barrett was prosecuted for code violations at this property and was found guilty by Judge George E. Hoffer, now President Judge, at No. 1993-00807 Criminal Term; see Exhibit "A" attached hereto and incorporated herein.

26. In 1994, Barrett was prosecuted for code violations at 25 North Bedford Street and the two South East Street properties and was found guilty by Judge Edgar B. Bayley at No. 1994-00583; see Exhibit "B" attached hereto and incorporated herein.

27. On appeal, the Commonwealth Court of Pennsylvania upheld both of the preceding guilty judgments; see Exhibits "A" and "B."

28. On December 21, 1994, upon appeal by Barrett of borough council's local agency decision ordering the condemnation of his property at 25 North Bedford Street as unfit for occupancy, Judge Edgar B. Bayley affirmed council's determination at Nos. 94-2346 and 94-2967 Civil Term; see Exhibits "C & D" attached hereto and incorporated herein.

29. Barrett's appeal of the condemnation order to the Commonwealth Court was dismissed. (No. 208 C.D. 1995)

30. On both October 5, 1995, and September 9, 1996, Barrett was found to be in contempt of the condemnation

order for occupying the property in violation of the condemnation orders; see Exhibits "E" and "F" attached hereto and incorporated herein.

31. On October 11, 1996, sixty citations, covering the period from March 1, 1995 through October 1, 1996, were filed against Barrett for his unabated violations of the code at the North Bedford Street property.

32. On July 24, 1997, at No. 97-0378 Criminal Term, Judge Edgar B. Bayley found Barrett guilty on twenty of the sixty citations; see Exhibit "G" attached hereto and incorporated herein.

33. In his accompanying Opinion, Judge Bayley expressly found that there was sufficient evidence to find Barrett guilty beyond a reasonable doubt on all of the citations, but tempered his verdict in what he stated was an effort to strike a balance between the Borough's interest in having the property repaired and the effect the imposition of numerous fines would impose on Barrett's financial ability to make the repairs; see Exhibit "H" attached hereto and incorporated herein.

34. To this date, Barrett has not paid all of the fines associated with the 1997 guilty verdicts, nor has he made the necessary repairs to the property on 25 North Bedford Street.

35. In an August 29, 1994, letter from Brian Dennis, Borough of Carlisle Code Manager, Barrett was informed of numerous violations of the code at his properties within the historic district, including violations at 35 South Bedford Street, 37 South Bedford Street, 25 South East Street, 29 South East Street, 134 East High Street and 138 East High Street.

36. After no corrective repairs were made by Barrett, citations were filed against him and, on June 7, 1995, at No. 95-0546 Criminal Term, Judge Edgar B. Bayley found Barrett guilty of three citations: one for failure to maintain the front porch at 138 East High Street, one for a disintegrating rear porch at 37 South Bedford Street and one for a missing hand rail on a porch at 29 South East Street; see Exhibit "I" attached hereto and incorporated herein.

37. On February 14, 1996, at No. 95-1938, Judge Bayley again found Barrett guilty of violating the code for failure to maintain and repair the front porch at 138 East High Street; see Exhibit "J" attached hereto and incorporated herein.

38. On February 12, 1996, Barrett applied to borough council for a Certificate of Appropriateness and a permit to demolish the three connected structures at 134, 136 and 138 East High Street, all located in the historic district and centrally located on a main street.

39. At its March 18, 1996, meeting, the Carlisle Historical Architectural Review Board denied Barrett's application and issued a detailed, written opinion containing the reasons for denial on April 3, 1996.

40. On April 8, 1996, borough council held a public hearing on Barrett's request.

41. After a full and complete hearing, including testimony from Barrett, a historic preservation specialist, a representative of the Pennsylvania Historical and Museum Commission, and concerned neighbors, borough council voted to deny Barrett's request for permission to demolish the East High Street properties because the buildings were found

to be a significant contribution to the historic district and structurally sound.

42. Barrett appealed this denial and, on May 5, 1997, at No. 96-2446 Civil Term, Judge Edgar B. Bayley affirmed borough council's decision; see Exhibit "K" attached hereto and incorporated herein.

43. Barrett appealed to the Commonwealth Court which affirmed Judge Bayley's decision on January 29, 1998, at No. 1431 C.D. 1997; see Exhibit "L" attached hereto and incorporated herein.

44. Barrett again appealed, and on June 9, 1998, the Pennsylvania Supreme Court issued an Order denying his Petition; see Exhibit "M" attached hereto and incorporated herein.

45. Notwithstanding his repeated failures to invalidate the Borough's historic District in the state courts, on July 9, 1998, Barrett filed a civil action against the Borough in the U.S. District Court for the Middle District of Pennsylvania, which action sets forth the identical claims he made in the state courts; see Exhibit "N" attached hereto and incorporated herein by reference.

46. Barrett has continued to refuse to make the necessary repairs to the East High Street properties.

47. On May 15, 1998, District Justice Paula P. Correal found Barrett guilty of 158 property maintenance code violations at the North Bedford Street and East High Street properties and fined him $106,200.00, plus costs of $5,530.00, for a total of $111,730.00; see Exhibit "O" attached hereto and incorporated herein.

48. On May 11, 1998, Barrett applied for a building permit to perform exterior work on the North Bedford Street property, but refused to apply for a Certificate of Appropriateness under the Borough's historic district regulations.

49. By letter of May 20, 1998, the Borough informed Barrett of the reasons why a building permit would not be issued; see Exhibit "P" attached hereto and incorporated herein.

50. Despite not having been issued a permit, Barrett commenced to perform the work.

51. On June 2, 1998, the Borough served a stop work order upon Barrett; see Exhibit "Q" attached hereto and incorporated herein.

52. By letter of June 22, 1998, Barrett provided additional information concerning his building permit request and reiterated his refusal to submit to the historic review process; see Exhibit "R" attached hereto and incorporated herein by reference.

53. Barrett continued to perform work on the property without benefit of a permit on July 14, 15, and 19, 1998.

54. Despite the issuance of the stop work order, Barrett continues to this date to perform the work without having a building permit.

55. By letter of July 17, the Borough again outlined to Barrett its refusal to issue the requested permit; see Exhibit "S" attached hereto and incorporated herein by reference.

56. On numerous prior instances Barrett has commenced exterior work without securing the necessary

approvals.

57. At all times relevant herein, Barrett was fully aware of the Borough's requirements with respect to building permits and historic district Certificates of Appropriateness.

58. The Borough believes, and therefore avers, that of the eleven properties Barrett owns within the historic district, at most only one is currently fit for human habitation.

59. The Borough asserts that of the buildings Barrett owns within the historic district, none are in conformity with the code and most, if not all, pose a hazard to the public and surrounding structures.

60. Barrett has repeatedly vowed not to comply with the Borough's historic district regulations, as he refuses to recognize their validity and applicability to his properties.

61. The Borough has consistently and continually notified Barrett in an effort to secure his voluntary compliance with the code and historic district regulations prior to resorting to the filing of citations.

62. In spite of these accommodations, Barrett continues to refuse to repair and maintain the properties he owns in the historic district and to comply with its regulations.

63. To date, Barrett has cost the Borough over $25,000 in legal fees.

64. Barrett's persistent pattern of refusing to comply evidences his intent not to abide by applicable regulations and not to restore his properties to an acceptable condition.

65. Upon information and belief, the Borough believes, and therefore avers, that Barrett's remaining

buildings can be salvaged and restored to comply with the code and the historic district regulations without causing undue economic hardship.

66. Barrett intends to allow his eleven properties to fall into such disrepair that no economic value will remain in them so that demolition can be effected, thus having a deleterious effect on the surrounding properties and the historic district.

67. Barrett has undertaken a coordinated plan to blight the Borough's historic district.

68. As an absentee owner, Barrett is not available, and is unwilling, to undertake appropriate maintenance and repairs of his eleven properties within the Borough's historic district.

69. The code violations at Barrett's properties have continued unabated, notwithstanding the filing of multiple actions by the Borough, criminally through the filing of citations and administratively through the civil condemnation action.

70. The Borough has tried amicably and legally for over five years to compel Barrett to meet the minimum standards its other citizens are required to adhere to; if equitable relief is not granted, the Borough will continue to be frustrated in its legitimate efforts to enforce its code and historic district regulations.

71. Barrett's refusal to comply with the historic district regulations by failing to properly maintain his buildings and by making exterior repairs without the approvals required thereunder will cause a permanent deleterious effect on the surrounding properties and the

historic district in general, thereby causing irreparable harm to citizens of the Borough and to the owners of surrounding properties.

72. The statutory and administrative remedies available to the Borough have been inadequate to insure enforcement of its code and historic district regulations.

73. Equity jurisdiction will avoid a future multiplicity of actions.

WHEREFORE, the Borough respectfully requests your Honorable Court to enter an Order for the following equitable relief:

A. That an agent be appointed to manage Barrett's eleven properties within the historic district in order to bring the properties into compliance with the code and historic district regulations; and

B. That an injunction issue against Barrett prohibiting him from performing any repairs or alterations to any of his properties without first receiving certificates of appropriateness and building permits for such work; and

C. That the Borough be awarded its reasonable attorneys fees in this action, and all previous actions, between the parties; and

D. Such other equitable relief as the Court deems appropriate under the circumstances.

Edward L. Schorpp, Esquire
Solicitor, Borough of Carlisle

APPENDIX O

Constitutional and Statutory Provisions Involved in the Case

1. The Fourth Amendment to the United States Constitution, which provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. The Fifth Amendment to the United States Constitution, which provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

3. The Fourteenth Amendment to the United States Constitution, Section 1,which provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the

United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

4. Title 28, United States Code, Section 1257(a) (State courts of appeals; certiorari), which provides:

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

5. Title 42, United States Code, Section 1983 (Civil action for deprivation of rights), which provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured

in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(3)

Supreme Court, U.S.
FILED
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No. 00-1292

In The

Supreme Court of the United States

ROBERT H. BARRETT,

Petitioner,

v.

BOROUGH OF CARLISLE,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Pennsylvania

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

MARTSON DEARDORFF WILLIAMS & OTTO
EDWARD L. SCHORPP, ESQUIRE
Counsel of Record
Ten East High Street
Carlisle, PA 17013-3093
(717) 243-3341

Attorneys for Respondent Borough of Carlisle

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

35pp

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. SHOULD THIS COURT DENY THE PETITION FOR CERTIORARI WHERE THE PETITIONER AGAIN ATTEMPTS TO RAISE PREVIOUSLY LITIGATED PROCEDURAL AND SUBSTANTIVE ISSUES RELATING TO THE CARLISLE BOROUGH HISTORIC DISTRICT WHICH ARE BARRED UNDER *RES JUDICATA*?

Suggested Answer: in the Affirmative.

2. SHOULD THIS COURT DENY THE PETITION FOR CERTIORARI WHERE THE PETITIONER COMPLAINS OF THE TRIAL COURT'S ENTRY OF A DEFAULT JUDGMENT AGAINST HIM AS A SANCTION FOR HIS FAILURE TO PROVIDE DISCOVERY UNDER STATE CIVIL PROCEDURAL RULES, WHERE NO FOURTH AMENDMENT QUESTION IS PRESENTED?

Suggested Answer: in the Affirmative.

3. SHOULD THIS COURT DENY THE PETITION FOR CERTIORARI WHERE A STATE TRIAL COURT ENTERS A DEFAULT JUDGMENT PROVIDING APPELLEE EQUITABLE RELIEF IN THE FORM OF THE APPOINTMENT OF A MANAGER TO BRING PETITIONER'S PROPERTIES INTO CODE AND HISTORIC DISTRICT COMPLIANCE WHILE HE RETAINS OWNERSHIP AND JOINT POSSESSION, WHERE THE RECORD FAILS TO ESTABLISH A FIFTH AMENDMENT TAKING, AND WHERE HE INTENTIONALLY FORFEITS HIS RIGHT TO PRESENT EVIDENCE OF SUCH CLAIM AT TRIAL?

Suggested Answer: in the Affirmative.

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REASONS FOR DENYING THE WRIT

The petition does not meet the jurisdictional requirements mandated by 28 U.S.C. § 1257. This is a state equity case brought by a municipality against a property owner to gain compliance with its property code and historic district regulations. It is not, as alleged by petitioner, an action brought under 42 U.S.C. § 1983.

Petitioner, Robert H. Barrett (herein, "Barrett"), attempts to challenge the procedural and substantive validity of historic district regulations enacted over twenty years ago by the Borough of Carlisle (herein, the "Borough"). (*See* Petitioner's Statement of Questions Presented, Nos. 1 and 2). He previously litigated these matters through the Pennsylvania judicial system and, having found no success, commenced to re-litigate them in the federal court system (*See* Petition for Writ of Certiorari filed in this Court at No. 00-977, and specifically, Petitioner's Appendix Parts D and F and Brief in Opposition Appendix Part 1 filed therein). He is barred under the long standing doctrine of *res judicata*.

Barrett also challenges the authority of a state court to require compliance with that state's discovery rules relating to interrogatories and document requests. He asserts, without authority, that such discovery amounts to an unlawful search and seizure under the Fourth Amendment. Adoption of this absurd proposition would render all discovery in civil cases in all state and federal courts unlawful.

Finally, he asserts, again without authority, that the entry of a default judgment against him as a sanction amounts to a constitutional taking of property rights. He

waived this issue in the trial court by stubbornly permitting the default judgment to be entered. Nevertheless, the appointment of a manager to oversee bringing his properties into compliance with a property maintenance code, while he retains full ownership and joint possession, is an equitable remedy which does not rise to the status of a receiver, a long established equitable remedy which lacks constitutional overtones. Petitioner provides no evidence that he is being deprived of all economically beneficial use of his property.

Barrett presents no compelling federal or constitutional issues deserving of this Court's consideration and his Petition should be denied.

COUNTERSTATEMENT OF THE CASE

Barrett petitions for Writ of Certiorari from the Order of the Supreme Court of Pennsylvania entered January 8, 2001, which denied allowance of appeal from equity proceedings in the Pennsylvania state courts.[1] In those proceedings, the trial court entered a default judgment in favor of the Borough.[2] Rather than petitioning to open the default judgment as required by state court rules and precedent, Barrett chose to take an appeal to the Commonwealth Court of Pennsylvania, an intermediate

[1] Barrett has incorrectly stated his appeal to be from the Commonwealth Court of Pennsylvania, which is an intermediate state appellate court.

[2] The default judgment was entered as the Amended Final Decree dated January 24, 2001, and is attached to Barrett's Petition as Appendix C.

appellate court in the state judicial system. The Commonwealth Court affirmed the trial court's Order and Barrett was unsuccessful in obtaining review by the state's highest court, the Supreme Court of Pennsylvania.

The genesis of the Borough's equity complaint was Barrett's years of refusal to bring his properties into compliance with the Borough's BOCA Property Maintenance Code ("Code") and Historic District regulations. The complaint averred that, commencing in 1992, the Borough cited Barrett on a continuous basis for well over one hundred and seventy (170) Code violations. Barrett had also unsuccessfully challenged the procedural and substantive validity of the regulations in the Historic District Ordinance. *See Barrett v. Borough of Carlisle*, 707 A.2d 250 (Pa. Commw. 1998), *petition for allowance of appeal denied*, 555 Pa. 714, 724 A.2d 350 (1998).[3]

In pre-trial discovery, the Borough served Barrett with interrogatories and requests for production of documents. (*See* Petitioner's Appendix Parts K and L). On October 7, 1999, the trial court adjudicated Barrett in contempt for his failure to comply with its Order of June 3, 1999, directing him to answer the Borough's interrogatories and requests. (*See* Petitioner's Appendix Part G at G2, G3 and G4 and Respondent's Appendix Part 1). He was incarcerated, and when his defiance continued, he was eventually released under an order directing his

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[3] Barrett did not appeal directly to this Court, but filed a new suit in U.S. District Court in an effort to relitigate the same issues here presented. *See* U.S. Supreme Court Docket No. 00-977 and the matters filed therein.

compliance under penalty of the entry of a default judgment. (*See* Respondent's Appendix Part 2). Barrett still did not comply and the trial court, after hearings, entered the judgment in the form of the Amended Final Decree.

ARGUMENT

Rule 10 of the Rules of the Supreme Court of the United States indicates, in pertinent part, as follows:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> . . .
>
> (c) a state court . . . has decided an important question of federal law that has not been, but should be settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

As an initial consideration, the Borough submits that Barrett's Petition is replete with inaccurate averments of fact not appearing of record in the proceedings below. Further, he miscategorizes this case as one premised under the umbrella of 42 U.S.C. § 1983. It is not. It is a case brought in equity by a municipality seeking compliance by a stubborn and recalcitrant owner with its property maintenance code and historic district regulations. Nevertheless, the Borough presents the following reasons why this Court should not grant Certiorari.

This Court should deny the Petition for Certiorari because the petitioner again attempts to raise previously litigated procedural and substantive issues relating to the Carlisle Borough Historic District which are barred under *res judicata*.

Barrett's petition asserts that this Court should review his claims that the Borough's historic district regulations are both procedurally invalid and substantively unlawful. Previously, he unsuccessfully litigated these identical issues through the Pennsylvania judicial system. *See Barrett v. Borough of Carlisle*, 707 A.2d 250 (Pa. Commw. 1998), *petition for allowance of appeal denied*, 555 Pa. 714, 724 A.2d 350 (1998). He did not take a direct appeal by filing a Petition for Writ of Certiorari with this Court from the denial of his appeal by the Supreme Court of Pennsylvania. Instead, he chose to relitigate the issues by starting over in the United States District Court. (*See* Petition for Writ of Certiorari filed in this Court at No. 00-977, and specifically, Petitioner's Appendix Parts D and F and Brief in Opposition Appendix Part 1 filed therein). Under the authority cited by the United States District Court, those issues were barred by *res judicata*. Pennsylvania and federal law are consistent on this long established doctrine of judicial economy. Barrett's petition presents no compelling reason why this Court should grant further review.

Notwithstanding the bar of *res judicata*, the Supreme Court of Pennsylvania has consistently and repeatedly recognized this Court's decision in *Penn Central Transportation Company v. New York City*, 438 U.S. 104, 57 L. Ed.2d 631 (1978). *See United Artists' Theater Circuit, Inc. v. City of*

Philadelphia, 535 Pa. 370, 635 A.2d 612 (1993); *Pittsburgh v. Weinberg*, 544 Pa. 286, 676 A.2d 207 (1996); and *Park Home v. City of Williamsport*, 545 Pa. 94, 680 A.2d 835 (1996). It is well-settled in Pennsylvania that the historic designation of property without the owner's consent does not amount to a taking under the Fifth and Fourteenth Amendments to the United States Constitution, but is rather a restriction on the owner's use of that property.

Moreover, this case involves considerably more than historic district regulation. It is about a recalcitrant owner who refuses to make basic repairs to his properties in order to bring them into compliance with the nationally recognized BOCA Property Maintenance Code, as adopted locally by the Borough. Barrett has made no assertion that the application of that Code violates any federal law or constitutional protection.

This Court should deny the Petition for Certiorari where the Petitioner complains of the trial court's entry of a default judgment against him as a sanction for his failure to provide discovery under state civil procedural rules, because no Fourth Amendment question is presented.

By his own doing, Barrett suffered the penalty of a default judgment imposed by the trial judge as a sanction for his stubborn refusal to provide answers to certain interrogatories and produce certain documents authorized by state discovery rules. The sanction was not imposed as a result of any failure to allow property inspections as misstated in his Petition. The Pennsylvania Rules of Civil Procedure are substantially similar to the Federal Rules of Civil Procedure and the civil procedural

rules of most states in permitting pre-trial discovery of information via written interrogatories and requests for production of documents.[4]

Barrett has not cited any authority for his absurd proposition that civil pre-trial discovery by interrogatories and document production requests amounts to an unlawful Fourth Amendment "search" in contravention of the United States Constitution. Such a blanket prohibition would essentially eliminate pre-trial discovery in all courts in our nation. While certain materials that would lead to self-incrimination and criminal prosecution are constitutionally protected from civil discovery, Barrett has not related, nor preserved for appeal, any such nexus in this case. None exists in fact, and no federal or constitutional issue is presented.

This Court should deny the Petition for Certiorari where the state trial court enters a default judgment providing appellee equitable relief in the form of the appointment of a manager to bring petitioner's properties into property code and historic district compliance while he retains ownership and joint possession, where the record fails to establish a Fifth Amendment taking, and where he intentionally forfeits his right to present evidence of such claim at trial.

Preliminarily, the Borough submits that Barrett has made unsubstantiated factual averments in this and other portions of his Petition which were never proven by him at trial or any hearing. In fact, his egregious conduct was

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[4] See Pennsylvania Rules of Civil Procedure No. 4001, *et seq.*, and Federal Rules of Civil Procedure No. 26, *et seq.*

the sole reason there was no trial. Further, Barrett cites no authority, either state or federal, for his proposition that the appointment of a manager to bring a recalcitrant landowner's properties into compliance with a property maintenance code, without more, is tantamount to a Fifth Amendment taking without just compensation.

This is not a case of the permanent taking of private property for a public access easement as in *Nollan v. California Coastal Commission*, 483 U.S. 825, 97 L. Ed.2d 677 (1987) or *Dolan v. City Of Tigard*, 512 U.S. 374, 129 L. Ed.2d 304 (1994). Nor does it meet the test established by this Court in *Penn Central, supra.*, and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 120 L. Ed.2d 798 (1992). To constitute a taking, this test requires a showing that the regulations and/or the decree do not substantially advance legitimate state interests or that an owner is denied all economically beneficial or productive use of land. This Court has recognized that this occurs only in extraordinary circumstances. The record in this case does not support a finding of a taking, and by denying appellate review, the Supreme Court of Pennsylvania so recognized.

The record is clear that Barrett was unwilling to bring his properties into compliance with the Borough's property maintenance code. He was put on notice as to what would be the result of his continued disregard of the trial court's order and had ample opportunity to comply. The order compelling written and document discovery is not an unconstitutional "search."

Just as importantly, a careful review of the Amended Final Decree indicates that Barrett retains ownership and

joint possession of his properties. His tenants were not to be disturbed of peaceful possession of their units. He is given the opportunity, with approval of the trial court and upon securing the necessary permits, to perform the required repairs or cause them to be performed on his behalf.

The powers granted to the agent in the Amended Final Decree do not rise to the status of an equitable receiver with outright power to sell his properties. Notwithstanding, as this is an equity case, outright receivership could have been considered. Both federal and state law recognize the long-standing remedy of receivership and no court has found it to be, without more, a taking in the constitutional sense. On the facts of this case, there is no constitutional issue presented or preserved for review by this Court. Moreover, the record does not substantiate that an unlawful taking of property has occurred.

CONCLUSION

Barrett has presented no compelling reason why this Court should grant a Writ of Certiorari in this state equity case. He has presented no important question of federal law or divergence of judicial opinion which would justify

review. In light of the foregoing, Respondent Borough of Carlisle prays that this Honorable Court will deny Barrett's Petition for Writ of Certiorari.

Respectfully submitted,

MARTSON DEARDORFF WILLIAMS & OTTO
EDWARD L. SCHORPP, ESQUIRE

Ten East High Street
Carlisle, PA 17013-3093
(717) 243-3341

Attorneys for Respondent
Borough of Carlisle

Date: February 21, 2001

APPENDIX 1

BOROUGH OF CARLISLE, Plaintiff,	:	IN THE COURT OF COMMON PLEAS OF CUMBERLAND COUNTY, PENNSYLVANIA 98-4145 EQUITY
V.	:	
ROBERT H. BARRETT Defendant	:	

ORDER OF COURT

AND NOW, this 7th day of October, 1999, pursuant to Pennsylvania Rule of Civil Procedure 4019(c) (4), I adjudicate you in civil contempt for failing to comply with the order of June 3, 1999.

You may purge yourself of contempt by complying with the order by 1:15 p.m. on Wednesday, October 13, 1999. You are ordered to appear in Courtroom Number 2, Cumberland County Courthouse, Carlisle, Pennsylvania at 1:15 p.m., Wednesday, October 13, 1999, to determine if you have complied with this order. If you have not complied, you will be committed to the Cumberland County Prison at that time until you purge yourself of contempt.

At that hearing the Borough of Carlisle shall produce evidence of its counsel fees for obtaining this order of compliance, including its counsel fees incurred in obtaining the order of compliance dated June 3, 1999. Counsel fees will be awarded and as part of defendant's conditions of purge of this order of civil contempt. He shall be then ordered to pay such counsel fees in full, not later than December 1, 1999.

This order will not be stayed unless a supersedeas is issued by a higher court of this Commonwealth.

By the Court,

/s/ Edgar B. Bayley
Edgar B. Baylery J.

Edward L. Schorpp, Esquire
For the Plaintiff

Robert H. Barrett, Pro Se

lt

APPENDIX 2

BOROUGH OF CARLISLE,	:	IN THE COURT OF
PLAINTIFF	:	COMMON PLEAS OF
	:	CUMBERLAND
V.	:	COUNTY,
ROBERT H. BARRETT,	:	PENNSYLVANIA
	:	
DEFENDANT	:	98-4145 EQUITY
	:	TERM
	:	

IN RE: SANCTIONS FOR FAILURE TO COMPLY WITH AN ORDER DIRECTING DISCOVERY BEFORE BAYLEY, J. OPINION AND ORDER OF COURT

Bayley, J., November ___, 1999: –

On **July 22, 1998**, plaintiff, the Borough of Carlisle, filed this complaint in equity against defendant Robert H. Barrett. Alleging that Barrett is the owner of eleven properties, eight improved, in the historic district of the Borough of Carlisle, the Borough sought the following equitable relief:

> A. **That an agent be appointed to manage Barrett's eleven properties within the historic district in order to bring the properties into compliance with the code and historic district regulations; and**
>
> B. Than an injunction issue against Barrett prohibiting him from performing any repairs or alterations to any of his properties without first receiving certificates of appropriateness and building permits for such work; and

C. That the Borough be awarded its reasonable attorneys fees in this action, and all previous actions, between the parties; and

D. Such other equitable relief as the Court deems appropriate under the circumstances. (Emphasis added.)

The genesis of this longstanding dispute between plaintiff and defendant is defendant's refusal to comply with the provisions of the Carlisle Historic District ordinance in bringing his property into compliance with the Borough's BOCA Code. Defendant has unsuccessfully challenged the regulations set forth in the Historic District ordinance, **Barrett v Borough of Carlisle**, 707 A.2 250 (Pa. Commw. 1998), petition for allowance of appeal denied 555 Pa. 714 (1998).

Plaintiff has averred in its complaint, **inter alia**, that (1) defendant was found guilty of code violations in 1993, (2) he was found guilty of code violations in 1994, which judgment was affirmed by the Commonwealth Court of Pennsylvania,[1] (3) one of his properties was condemned by the Borough in December, 1994, which was affirmed in this court with his appeal to the Commonwealth Court being dismissed,[2] (4) he was found guilty of code violations in 1995, (5) on October 5, 1995 and September 9, 1996, he was found in contempt of the condemnation order, (6) on February 14, 1996, he was found guilty of code violations, (7) on July 24, 1997, he was found guilty of twenty code violations, and (8) on May 15, 1998, he

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[1] 655 A.2d 678 (Pa. Commw. 1995).

[2] ___ Pa. Commw. ___ (208, 209 C.D. 1995, March 31, 1995).

was found guilty of one hundred and fifty-eight code violations.

In its complaint, the Borough avers that Barrett is an absentee owner and has undertaken a coordinated plan to blight the Borough's Historic District. It avers that Barrett has continued to refuse to repair and maintain the properties he owns in the Historic District, and to comply with the Borough's ordinances, and that he has vowed not to comply with the ordinances because he refuses to recognize their validity and applicability to his properties. The Borough avers that it believes that Barrett's buildings can be salvaged and restored to comply with the BOCA Code and Historic District regulations without causing undue economic hardship. It further avers that Barrett intends to allow his properties to fall into such disrepair that no economic value will remain in them so that demolition can be affected, thus having a deleterious effect on the surrounding properties in the Historic District. The Borough concludes by averring that "The statutory and administrative remedies available to the Borough have been inadequate to insure enforcement of its code and historic district regulations."

Barrett filed preliminary objections to the complaint which were dismissed on **February 9, 1999**. The court concluded that plaintiff, pursuant to the **Borough of Kennet Square v. Lal**, 165 Pa. commw. 573 (1994), had stated a complaint upon which relief could be granted. Defendant filed an answer to the complaint on **December 22, 1998**.

On **January 8, 1999**, defendant filed a notice of removal to the United States District Court for the Middle

District of Pennsylvania. Plaintiff filed a motion to remand which was granted by an order of the District Court dated **March 18, 1999**. On **April 29, 1999**, plaintiff filed a motion to allow issuance of a subpoena to the Pennsylvania Historical and Museum Commission. That motion was denied on **April 23, 1999**. On **May 11, 1999**, defendant filed a second notice of removal to the United States District Court for the Middle District of Pennsylvania. Plaintiff filed a motion for remand and on **May 13, 1999**, the District Court remanded the case to this court and further ordered its Clerk of Court to refuse to accept for filing any further notices of removal of the case.

The Borough of Carlisle sought discovery in the form of answers to interrogatories, the production of documents, and the inspection of the eight improved properties subject to this dispute. Defendant refused to allow the inspection of the properties and failed to comply with much of the discovery requested. On **June 3, 1999**, following a hearing on plaintiff's motion to compel compliance with its request for discovery, the following order was entered:

I. OBJECTIONS OF DEFENDANT TO PLAINTIFF'S INTERROGATORIES

1. Interrogatory No. 1. The objection **IS SUSTAINED** because the information sought is not relevant.

2. Interrogatory No. 2. The objection **IS SUSTAINED** except that defendant shall state his annual salary and any other income for the years 1996, 1997, 1998 and 1999 to date.

3. Interrogatory No. 5. The objection **IS OVERRULED**. Defendant shall answer this interrogatory in its entirety.

4. Interrogatory No. 7. Because defendant has identified only himself as an expert who will be called to testify, and he has answered the interrogatory with respect to himself, the objection **IS SUSTAINED**.

5. Interrogatory No. 10. The objection **IS SUSTAINED** because the information sought is not relevant.

6. Interrogatory No. 14. The objection **IS OVERRULED**. Defendant shall answer this interrogatory in its entirety.

7. Interrogatory No. 16. The objection **IS OVERRULED**. Defendant shall answer this interrogatory in its entirety.

8. Interrogatory No. 15. The objection **IS SUSTAINED** as the information sought is not relevant.

9. Interrogatory No. 17. The objection **IS SUSTAINED** as the information sought is not relevant.

10. All interrogatories that defendant is ordered to answer as set forth above shall be answered within twenty (20) days of this date.

II. PLAINTIFF'S MOTION TO COMPEL DEFENDANT TO COMPLY WITH PLAINTIFF'S REQUEST FOR PRODUCTION OF DOCUMENTS

1. Request No. 2. **IS DISMISSED** as overbroad.

2. Request No. 6. The motion **IS GRANTED.** Defendant shall provide plaintiff with such documents.

3. Request No. 7. The motion **IS GRANTED.** Defendant shall provide plaintiff with such documents.

4. Request No. 8. **IS DISMISSED** as not relevant.

5. Request No. 9. **IS DISMISSED** as defendant was issued any such permits by plaintiff who has knowledge of them.

6. Request No. 10. **IS DISMISSED** as overbroad.

7. Request No. 11. The motion **IS GRANTED.** Defendant shall provide such documents to plaintiff.

8. All documents that defendant is ordered to produce as set forth above shall be produced within twenty (20) days of this date.

III. REQUEST FOR INSPECTION OF IMPROVED PROPERTIES OF DEFENDANT AT 25 NORTH BEDFORD STREET, 35 SOUTH BEDFORD STREET, 37 SOUTH BEDFORD STREET, 122 EAST LIBERTY AVENUE, 134 EAST HIGH STREET, 136 EAST HIGH STREET, 138 EAST HIGH STREET AND 29 SOUTH EAST STREET

1. The request for the inspection of the aforesaid improved properties, which is opposed by defendant, **IS GRANTED.**

2. A group of up to six people may enter said properties, those people being one borough representative, the borough solicitor, a photographer who may be a borough representative, a real estate appraiser, a structural engineer and a contractor.

3. The entry of each property shall be for the purpose of inspecting, measuring, photographing, videotaping, testing, sampling, or analyzing the said properties and all fixtures and for code violations.

4. Each inspection may last for up to three hours.

5. The inspection schedule shall be as follows:

a. The inspection of 25 North Bedford Street shall commence at 9:00 a.m., Monday, June 21, 1999.

b. The inspection of 35 South Bedford Street shall commence at 1:00 p.m., Monday, June 21, 1999.

c. The inspection of 37 South Bedford Street shall commence at 9:00 a.m., Tuesday, June 22, 1999.

d. The inspection of 122 East Liberty Avenue shall commence at 1:00 p.m., Tuesday, June 22, 1999.

e. The inspection of 134 East High Street shall commence at 9:00 a.m., Wednesday, June 23, 1999.

f. The inspection of 136 East High Street shall commence at 1:00 p.m., Wednesday, June 23, 1999.

g. The inspection of 138 East High Street shall commence at 9:00 a.m., Thursday, June 24, 1999.

h. The inspection of 29 South East Street shall commence at 1:00 p.m., Thursday, June 24, 1999.

6. Defendant shall provide complete access to these properties by the inspectors and shall not interfere with said inspections.

7. This inspection schedule may only be altered upon agreement of *both* parties for their convenience. (Footnote omitted.)

Defendant filed a petition to vacate the discovery order of June 3, 1999. On **June 17, 1999**, an order was entered that "[t]he petition to vacate the discovery order dated June 3, 1999, is denied." On **June 21, 1999**, defendant filed an interlocutory appeal to the Commonwealth Court of Pennsylvania from the order of June 3, 1999. The appeal was docketed in the commonwealth Court at No. 1662 C.D. 1999. On **June 23, 1999**, this court filed an opinion in support of the order of June 3, 1999. On **June 28, 1999**, defendant filed a second interlocutory appeal to the Commonwealth Court of Pennsylvania from the order of June 17, 1999, that denied his petition to vacate the discovery order issued on June 3, 1999. That appeal was docketed in the Commonwealth Court at No. 1662 C.D. 1999. On **July 19, 1999**, the Commonwealth Court at 1661 and 1662 C.D. 1999, quashed defendant's appeals as interlocutory.

Plaintiff filed a motion to hold defendant in civil contempt for failing to comply with the inspection schedule set forth in the order of June 3, 1999. Following

hearings, on **July 7, 1999**, the following order was entered:

> [I] adjudicate you in civil contempt of court for violating this Court's inspection order of June 3, 1999. You are committed to the Cumberland County Prison until you purge yourself of contempt. You may purge yourself of contempt by advising me at any time that you will comply with the inspections as required by the order of June 3, 1999, and at that point I will then immediately set a new inspection schedule, and I will then have a sheriff take you to the first scheduled inspection, and if you comply with that inspection order, you may remain out of prison for as long as you continue to purge yourself of contempt by allowing all further inspections as scheduled. Defendant is to stand committed in civil contempt until the conditions of purge are met or he obtains a supersedeas from an Appellate Court.

After defendant spent forty-one days in prison in defiance of the order to allow plaintiff to inspect his properties, he was released on **August 17, 1999**, on the following order:

> [d]efendant, Robert H. Barrett, having advised this court by letter received this date that he 'agrees to comply with the inspections as required by the Order of June 03, 1999,' a copy of which is attached hereto, and upon relation that the Carlisle Borough Solicitor is out of town until August 23, 1999, and that the gathering of the six people authorized by the order of June 3, 1999, to make said inspections cannot be quickly assembled, it is ORDERED:

1. The Carlisle Borough Solicitor shall provide this court with dates during which the inspections of the eight properties as provided for in the order of June 3, 1999, can be conducted at the rate of two inspections a day, one in the morning and one in the afternoon.

2. Following receipt of said dates an additional order will be entered scheduling the inspections at which time defendant will be held in compliance pursuant to the order of June 3, 1999, and his current agreement in writing that he will now comply with the inspections.

3. Defendant is temporarily released from commitment under this court's order of July 7, 1999, adjudicating him in civil contempt for violating the inspection order of June 3, 1999, conditioned upon his compliance with the new scheduling order to be entered.

On **August 23, 1999**, a new inspection schedule was ordered with the first inspection to commence at 9:00 a.m., Monday, **August 30, 1999**. Defendant appeared in court on **August 30, 1999**, with a motion to prohibit the inspections until plaintiff posted a bond to cover any injuries that might occur while its representatives were on his properties. The motion was denied and the inspections scheduled for that day and all subsequent dates per the order of August 23, 1999, were conducted.

Defendant, however, continued to refuse to comply with that part of the discovery order of June 3, 1999, requiring him to answer interrogatories and produce certain documents. Plaintiff filed a petition to hold him in civil contempt. Following hearings, on **October 7, 1999**, the following order was entered:

> [p]ursuant to Pennsylvania Rule of Civil Procedure 4019(c)(4), I adjudicate you in civil contempt for failing to comply with the order of June 3, 1999.
>
> You may purge yourself of contempt by complying with the order by 1:15 p.m. on Wednesday, October 13, 1999. You are ordered to appear in Courtroom Number 2, Cumberland County Courthouse, Carlisle, Pennsylvania at 1:15 p.m., Wednesday, October 13, 1999, to determine if you have complied with this order. If you have not complied, you will be committed to the Cumberland County Prison at that time until you purge yourself of contempt.
>
> At that hearing the Borough of Carlisle shall produce evidence of its counsel fees for obtaining this order of compliance, including its counsel fees incurred in obtaining the order of compliance dated June 3, 1999. Counsel fees will be awarded as part of defendant's conditions of purge of this order of civil contempt. He shall be then ordered to pay such counsel fees in full, not later than December 1, 1999. . . .

Defendant did not comply with the order as directed by October 13, 1999, and has been incarcerated in the Cumberland County Prison since that date for failing to answer interrogatories and produce documents under the sanction imposed by this court pursuant to Pa. Rule of Civil Procedure 4019(c)(4).[3] Having previously spent forty-one days in prison until he complied with that part of the order of June 3, 1999, for the inspection of the

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[3] Defendant was also ordered to pay counsel fees to plaintiff in the amount of $981.

subject properties, and now going back to prison on October 13, 1999, for failure to comply with part of the same order directing him to answer interrogatories and produce documents, it is obvious that defendant's stubbornness is significantly delaying litigation of this case which was commenced on July 22, 1998. Pa. Rule of Civil Procedure 4019(c)(3), allows the following sanction for refusal to comply with a discovery order:

> [a]n order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, **or entering a judgment** of non pros or **by default against the disobedient party** or party advising the disobedience. (Emphasis added.)

In applying this sanction, the Superior Court of Pennsylvania stated in **Stewart v. Rossi**, 681 A.2d 214 (Pa. Super. 1996):

> We note initially that dismissal of a complaint as a discovery sanction is authorized under Pa.R.Civ.P. 4019. *Pride Contracting Inc. v. Biehn Construction, Inc.*, 381 Pa.Super. 155, 553 A.2d 82 (1989); *see also Lawrence v. General Medicine Ass'n, Ltd.*, 412 Pa.Super. 163, 602 A.2d 1360 (1992) (judgment of non pros entered against plaintiff for violation for discovery rules); *Miller Oral Surgery, Inc. v. Dinello*, 416 Pa.Super. 310, 611 A.2d 232 (1992) (default judgment entered against defendant for discovery violation). Furthermore, the sanction to be imposed for a discovery violation is left to the sound discretion of the trial court. *Miller Oral Surgery, Inc. v. Dinello, supra*. However, **since dismissal is the most severe sanction, it should be imposed only in extreme circumstances, and a trial court is**

> **required to balance the equities carefully and dismiss only where the violation of the discovery rules is willful and the opposing party has been prejudiced.** *Pride Contracting, Inc. v. Biehn Construction, Inc., supra.*
>
> **Under these cases, the following factors are to be weighed: the nature and severity of the discovery violation, the defaulting party's willfulness or bad faith, prejudice to the opposing party, the ability to cure prejudice, and the importance of the precluded evidence in light of the failure to comply.** (Emphasis added.)

The most severe sanction as allowed under Pa. Rule of Civil Procedure 4019(c)(3) has been upheld for the failure to comply with a court order directing discovery. **Pride Contracting, Inc. v. Biehn Construction, Inc.**, 381 Pa. Super. 155 (1989).

Since the discovery order was entered following a hearing to compel on June 3, 1999, requiring defendant to answer certain interrogatories and produce certain documents, the nature and severity of this conduct has been egregious. He has completely failed to comply with the order for no legitimate reason. That failure has been willful, in bad faith, and has continued despite defendant's imprisonment for civil contempt since October 13, 1999. Defendant's bad faith is further evidenced by his filing two interlocutory appeals in the Commonwealth Court and two frivolous notices of removal to the United

States District Court. As to the importance of the discovery sought in light of defendant's failure to comply with the order to compel, the interrogatories in question are:[4]

(1) Defendant was directed to answer part of Interrogatory No. 2 by stating his annual salary and any other income for the years 1996, 1997, 1998 and 1999 to date. This information is important for plaintiff to meet any defense that defendant might raise with respect to any prior or current financial inability to bring his properties into compliance with the Borough's codes.

(2) Defendant was required to answer Interrogatory No. 5 which asked "Give the carrier name, policy number, and policy limits for each and every policy insuring each of the parcels of real estate owned by you in the borough of Carlisle; also state the nature of coverages under each." Plaintiff is seeking an order that an agent be appointed to manage Barrett's properties and to bring those properties into compliance with the BOCA Code and Historic District regulations. Knowledge as to the status of insurance coverage on each property is important as it relates to any relief that may be warranted.

(3) Defendant was directed to answer Interrogatory No. 14 which asked:

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[4] The order to compel only required defendant to answer some of plaintiff's interrogatories. Defendant's objections to the interrogatories were sustained as to Interrogatory 1, part of Interrogatory No. 2, and Interrogatories 7, 10, 16, and 17.

For each parcel of real estate situate in the Borough of Carlisle in which you have an ownership interest, state:

(A) whether such parcel is vacant or improved with a structure or structures and identify the type(s) of structure;

(B) the deed reference of your deed;

(C) the date of acquisition;

(D) the purchase price;

(E) whether or not it is encumbered by debt and identify the creditor, current unpaid balance owing, required monthly payment and record reference;

(F) whether the structure is occupied and by whom, and if not, the last date it was occupied during the ownership and by whom;

(G) the reason the structure is not occupied;

(H) the total sum you have spent for maintenance, repair, improvement or betterment, or demolition of such property since the date of your purchase; and

(I) if you removed, or caused to be removed, any structure on the parcel, state when the structure(s) were removed and the reason for removal.

Given the nature of the relief sought, all of this information goes to matters which would be expected to be raised in the trial and for which plaintiff should be properly prepared.

(4) Defendant was directed to answer Interrogatory No. 15 which asked:

> For each property identified in the foregoing Interrogatory, state the following:
>
> (A) identify any work you performed on each property in the nature of maintenance, repairs, improvements, betterment or demolition;
>
> (B) for each work identified in the preceding subsection, state whether or not you applied for any building permits to perform such work; and
>
> (C) for each work identified in the preceding subsection, whether or not you obtained any building permits to perform such work.

This information goes directly to the central issue regarding the case which is defendant's alleged long continued failure to comply with the Borough's codes.

With regard to the order to produce documents, the documents in question are:[5]

(1) Defendant was ordered in Request No. 6 to produce "All written rental records, inclusive of income and expense statements for each of the properties owned by Defendant in the Borough of Carlisle." With respect to any relief that may be warranted it is essential to plaintiff to know the full rental status of each property.

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[5] The order to compel only required defendant to produce some of the documents sought by plaintiff. Defendant's objections to the request for documents were sustained as to requests No. 2, 8, 9 and 10.

(2) Defendant was ordered in Request No. 7 to produce "All records reflecting all income, of any nature whatsoever, and all expenses related to each of the properties owned by you in the Borough of Carlisle during your period of ownership." This information properly supplements information regarding defendant's financial status to meet any issue regarding defendant's past or current financial ability to comply with the Borough's codes.

(3) Defendant was ordered in Request No. 11 to produce "Copies of the declaration pages of each policy of insurance applicable to each parcel of real estate owned by you in the Borough of Carlisle." This information properly supplements and verifies the required information regarding insurance in Interrogatory No. 5.

For the aforesaid reasons we find that the importance of the precluded evidence is considerable in light of defendant's failure to comply with the discovery order. In **Stewart v. Rossi, supra,** the Superior Court of Pennsylvania stated that prejudice for the purposes of a discovery violation is said to result any time there is a substantial diminution of a party's ability to properly present its case. We find that there is a substantial diminution in plaintiff's ability to properly present its case. The operative term here is "properly present its case."

The imprisonment of defendant for civil contempt has not altered his stubborn refusal to continue his delaying tactics in bringing this case to trial. Balancing the equities we are satisfied that unless defendant forthwith complies with the discovery order his conduct calls for the imposition of the most severe sanction of default

under Rule 4019(c)(3). At this juncture, neither notice nor an additional hearing is a necessary prerequisite to the imposition of this sanction. **Pride Contracting, Inc. v. Biehn Construction, Inc., supra**. Accordingly the following order is entered.

ORDER OF COURT

AND NOW, this 22nd day of November, 1999, **IT IS ORDERED:**

(1) If defendant fails to respond completely to the interrogatories and production of documents required by this court's order of June 3, 1999, not later than Wednesday, December 1, 1999, the following relief will be ordered:

(a) a default judgment will be entered in favor of plaintiff and against defendant;

(b) an agent will be appointed to manage defendant's eleven properties within the Historic District of the Borough of Carlisle in order to bring those properties into compliance with the Code and Historic District regulations;

(c) an injunction will be issued prohibiting defendant from performing any repairs or alterations to any of his properties without first receiving certificates of appropriateness and building permits for such work;

(d) the Borough will be awarded reasonable attorney fees in this action;

(e) a further hearing will be conducted for the issuance of additional equitable relief necessary to effectuate the aforesaid provisions.

(2) Defendant is released from his commitment to the Cumberland County Prison pursuant to the orders of October 7 and 13, 1999.

By the Court,

/s/ Edgar B. Bayley
Edgar B. Bayley, J.

Edward Schorpp, Esquire
for Plaintiff

Robert Barrett, Pro se
1101 Claremont Road
Cumberland County Prison
Carlisle, PA 17013

(4)

Supreme Court, U.S.
FILED
MAR 15 2001
OFFICE OF THE CLERK

No. 00-1292

In The
Supreme Court of the United States

ROBERT H. BARRETT,
Petitioner,

v.

BOROUGH OF CARLISLE,
Respondent.

On Petition For Writ Of Certiorari
To The Commonwealth Court Of Pennsylvania

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Robert H. Barrett
Petitioner, *pro se*
136 East High Street
Carlisle, Pennsylvania 17013
(703) 524-5949 or (717) 243-0989

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RESPONSE TO BRIEF OF BOROUGH OF CARLISLE

For more than fifteen (15) years, the Borough of Carlisle (herein, "the Borough") has unlawfully regulated the simple appearance of properties owned by Petitioner, Robert H. Barrett (herein, "Barrett") under false claims of public safety hazards and historic importance. The Borough has repeatedly (1) cited Barrett for alleged violations of the local property maintenance code and (2) denied Barrett building and demolition permits based on historic district regulations.

The Borough's claims against Barrett's properties are unsupported by factual evidence. Barrett has owned property in the Borough for over thirty (30) years. Under Barrett's ownership, no one has ever been harmed by Barrett's properties, and no tenant has ever filed a complaint with the Borough over a condition of Barrett's properties.

In its Response Brief, the Borough claimed that, "commencing in 1992, the Borough cited Barrett on a continuous basis for well over one hundred and seventy (170) Code violations." In fact, on appeal Barrett was found **NOT GUILTY** on nearly every citation. The few citations on which he was found guilty were against buildings for which Barrett had been denied building or demolition permits by the Borough based on historic district regulations. While refusing to issue building and demolition permits, the Borough continued to cite Barrett for the same buildings for which they denied him permits.

The Borough adopted the Building Officials and Code Administrators (BOCA) Code as its local property maintenance code. The BOCA Code is a set of "model building regulations for the protection of public health, safety

and welfare," and cannot lawfully be used to regulate the simple appearance of property. The Borough repeatedly uses the BOCA Code to regulate the simple appearance of property by falsely claiming public safety hazards and by condemning buildings without cause. A typical example is a large, brick garage owned by Barrett. For over six (6) years, the Borough has condemned the garage based on the false claim that it is "likely to collapse." The building was never "likely to collapse" and will continue to stand indefinitely.

Where it has been unable to regulate the simple appearance of property based on false public safety claims, the Borough regulates the simple appearance of property based on false claims of historic importance.

Under the provisions of Pennsylvania Act 167 of June 13, 1961, historic districts may be established within the Commonwealth of Pennsylvania and regulated by local government or other authority. However, before a local historic district can be regulated, it must first be certified as historically important by the Pennsylvania Historical and Museum Commission (herein, "the State Commission"). The Borough alleges that a thirteen (13) block area designated as the Carlisle Historic Preservation District (herein, "the Historic District") was certified by the State Commission in 1975. Neither the Borough nor the State Commission has produced an official document or other factual evidence of the alleged certification. Further, neither the Borough nor the State Commission has ever produced any evidence of a certification procedure, including certification criteria, notification of property owners, supporting evidence, analyses of specific properties, reasons for district boundaries, or anything else. When Barrett attempted to subpoena State Commission records of the alleged certification of the Historic District, the Court of Common

Pleas of Cumberland County, Bayley, J. (herein, "the Trial Court") denied the subpoena.

The Borough has repeatedly claimed that the issue of the validity of the Historic District is barred by the principle of *res judicata*. In State Courts, Barrett sought a single demolition permit for a building situate at 134-136-138 East High Street, Carlisle, but did not seek to overturn the Historic District.

In Federal Court, however, the primary relief requested by Barrett was to vacate the alleged certification of the Historic District. Issuance of a demolition permit was a secondary issue included to demonstrate to the Court the actual harm caused by regulation of the Historic District.

In the immediate case, Barrett has asked the Court to vacate a default judgment against him by the Trial Court, which appointed an agent to physically take possession of and to sell eight (8) improved properties owned by Barrett for refusing to comply with Historic District regulations and for refusing to allow warrantless searches of his papers under discovery proceedings in violation of the Fourth Amendment.

On February 05, 2001, after the Trial Court denied a stay of its Decree, the Borough and the Redevelopment Authority of Cumberland County (herein, "the Redevelopment Authority") took possession of Barrett's eight (8) improved properties by forced entry and physically locked Barrett out of his properties, including his personal residence. Tenants were directed to pay all rents to the Redevelopment Authority, and Barrett was ordered not to perform work on any of his properties. The Trial Court has deemed this action "joint possession," and will sell each of Barrett's properties unless its Decree is vacated.

ADDITIONAL REASONS FOR GRANTING THE WRIT

I. **Pennsylvania State Courts improperly applied the decision of the United States Supreme Court in *Penn Central* by failing to recognize historic certification validity as a threshold condition for application.**

The Borough claimed in its Response Brief that "... the Supreme Court of Pennsylvania has consistently and repeatedly recognized this Court's decision in *Penn Central Transportation Company v. New York City*, 438 U.S. 104, 57 L. Ed.2d 631 (1978)." In fact, the Supreme Court of Pennsylvania has improperly applied *Penn Central* by failing to recognize historic certification validity as a threshold or prerequisite condition for application.

The decision in *Penn Central* begins with the words **"On this record, ..."** These words establish that the decision in *Penn Central* is dependent on specific conditions of the case which are an inherent part of the final decision.

On the record of *Penn Central*, the New York City Landmarks Preservation Commission notified the owners of Grand Central Terminal of the proposed landmark designation (historic certification), and afforded the owners an opportunity to appear before the Commission at a public hearing to challenge the criteria and supporting evidence for the proposed certification. Following the public hearing, the Commission certified Grand Central Terminal. Although the owners challenged the historic certification before the Commission, they did not challenge the certification before the Court, as specifically noted by the Supreme Court of the United States in *Penn Central*. Because the owners did not challenge the historic certification before the Court, the

validity of the historic certification was assumed to be true and became a threshold or prerequisite condition for the Court's final decision in *Penn Central*.

Although the Court did not directly identify historic certification validity as a threshold condition in its decision, the condition is inherent in the Court's words "On this record." **In fact, establishment of historic certification validity constitutes a threshold condition for application of *Penn Central*.**

In the immediate case and in the preceding case docketed at No. 00-977, Barrett specifically challenged the validity of the alleged historic certification of the Historic District. **Thus, in the immediate case before the Court, the threshold condition for application of *Penn Central* has not been met.**

In its Response Brief, the Borough further stated that the Supreme Court of Pennsylvania has consistently applied the decision of *Penn Central* in *United Artists' Theater Circuit, Inc. v. City of Philadelphia*, 535 Pa. 370, 635 A.2d 612 (1993); *Pittsburgh v. Weinberg*, 544 Pa. 286, 676 A.2d 207 (1996); and *Park Home v. City of Williamsport*, 545 Pa. 94, 680 A.2d 835 (1996). In fact, the Supreme Court of Pennsylvania has misapplied *Penn Central* to these cases and to the immediate case.

In *United Artists*, the Pennsylvania Supreme Court vacated the historic certification of the Boyd Theater on grounds that the theater could not be certified as historic based on the Art Deco interior of the building. The Court, however, ignored the threshold condition of *Penn Central* and improperly denied that a Fifth Amendment "taking" had occurred during the temporary period of the theater's improper historic certification.

In both *Weinberg* and *Park Home*, the property owners failed to challenge the historic certification of their properties, thereby assuming its validity. Because the threshold condition of *Penn Central* was not challenged, the Pennsylvania Supreme Court's decisions in those cases were correct, albeit by chance. The Court failed, however, to properly apply *Penn Central* because it failed to recognize the threshold condition of historic certification validity in each case.

In the Borough's Response Brief, they further stated:

> "It is well-settled in Pennsylvania that the historic designation of property without the owner's consent does not amount to a taking under the Fifth and Fourteenth Amendments to the United States Constitution, but is rather a restriction on the owner's use of that property."

This generalized statement does not accurately reflect the decision of the Supreme Court of the United States in *Penn Central*. Specifically, the Borough's statement fails to recognize the threshold condition (e.g., historic certification validity) which must first be established before *Penn Central* can be applied. Pennsylvania State Courts have repeatedly failed to recognize the threshold condition and thereby have erred in application of *Penn Central* to both *United Artists* and to the immediate case. Before *Penn Central* can be applied, the validity of the historic certification must be clearly established.

II. The Borough misrepresented to the Court the significant differences in issues presented and relief requested between Barrett's State and Federal Complaints.

In its Response Brief, the Borough argues that Barrett is

attempting to relitigate issues previously decided in State Courts. In May 1996, Barrett filed an appeal in State Court of the simple denial of a single demolition permit by the Borough. In the State case, the relief requested was limited to obtaining a demolition permit. Barrett did not attempt to overturn the Historic District.

In July 1998, Barrett filed a Complaint in the United States District Court to **vacate the alleged certification of the Historic District** which was constitutionally flawed. The significant difference between the State and Federal actions was the nature of the relief requested and the scope of the properties affected. In the Federal case the primary relief requested was to vacate the alleged certification of the entire Historic District, which included eleven (11) properties owned by Barrett and approximately 1,000 other properties. In order for Barrett's claim to be considered ripe in Federal Court, Barrett included the denial of the demolition permit for the purpose of demonstrating specific harm.

III. The Borough falsely claimed violations of the property maintenance code and historic district regulations in order to regulate the simple appearance of Barrett's properties.

Regulation of the simple appearance of property is not a legitimate state function, with the limited exception of historically important property. Only where the conditions of property constitute an actual public fire, safety or health hazard can those conditions be regulated.

Because it could not lawfully regulate the simple appearance of property, the Borough attempted to circumvent this prohibition by falsely claiming that Barrett's properties were public safety hazards. While claiming that Barrett's

properties were public safety hazards, the Borough never produced any evidence of harm to the public, to other property owners, or to Barrett's tenants. In fact, no one was ever harmed by Barrett's properties during his thirty (30) year ownership. In fact, the Borough's claims of public safety hazards are perjured statements made for the purpose of regulating the simple appearance of Barrett's properties.

In the Borough's Response Brief, the Borough has again attempted to misrepresent facts to the Court by stating that it cited Barrett for well over one hundred and seventy (170) Code violations since 1992. In fact, on appeal, Barrett was found **NOT GUILTY** on nearly every citation. Of the <u>few</u> citations on which he was found guilty, all were against buildings for which the Borough had denied Barrett building or demolition permits based on Historic District regulations. While refusing to issue building and demolition permits, the Borough continued to cite Barrett for the same buildings for which they had denied him permits.

Barrett's garage is another example of perjured statements made by the Borough to the Court. For more than six (6) years the Borough has condemned a garage owned by Barrett as "likely to collapse" because of a wall damaged by a car accident. On appeal, a mason in the capacity of an expert witness testified that he had examined the building and that it was not going to collapse. Six (6) years later, the garage has not collapsed, will continue to stand indefinitely, but remains condemned by the Borough. In addition, the Borough has repeatedly denied Barrett permits to perform work on the garage, including repairs to the damaged wall, based solely on Historic District regulations.

The Borough's claims that Barrett's properties constitute public safety hazards are perjured statements made in an attempt to unlawfully regulate the simple appearance of

Barrett's properties and to prejudice the Court against Barrett.

Because the Borough cannot lawfully regulate the simple appearance of property under the BOCA Code, the Borough devised a scheme to establish the Historic District. Under Historic District regulations, the Borough is able to completely regulate the simple appearance of property, including paint colors, building materials, structural designs, and most importantly the demolition of buildings.

The Borough and the State Commission, however, failed to establish a Constitutionally valid historic district. **There is no factual evidence to support the alleged certification of the Historic District.** In fact, the Historic District is a district in name, only. In the absence of valid historic certification, the Borough has simply alleged that its Historic District was certified, and proceeded to regulate the District.

Absent valid historic certification, there is no lawful basis for the regulation of the simple appearance of property within the Historic District.

IV. The conditions of "joint possession" imposed by the Trial Court constitute a "taking" under the Fifth Amendment.

Under the conditions of the Trial Court's Amended Final Decree, Barrett is to retain "joint possession" of his properties along with the joint receivership headed by Judge Edgar B. Bayley of the Trial Court, the Borough of Carlisle, and the Redevelopment Authority. The Trial Court's assignment of "joint possession" is, in fact, a Fifth Amendment "taking" with a new name. In reality, Barrett will be locked out of his properties, including his personal residence and will effectively lose all rights of ownership.

The Trial Court will sell Barrett's properties following a decision in the immediate case.

On February 05, 2001, after the Trial Court denied a stay of its Decree pending appeal to the Supreme Court of the United States, the Borough and the Redevelopment Authority forced entry of each of Barrett's eight (8) improved properties, including his personal residence, physically entered each property and changed the locks, thereby locking Barrett out of his properties. Tenants were ordered to pay all rents to the agent, to contact the Redevelopment Authority if they had any problems, and Barrett was ordered to perform no further work on his properties. These actions are to be followed by the actual sale of the properties and clearly constitute a physical "taking" of property under the Fifth Amendment.

CONCLUSION

For the reasons set forth, Petitioner prays that the petition for writ of certiorari be granted.

Respectfully submitted,

By: Robert H. Barrett

Robert H. Barrett
Appellant, pro se
136 East High Street
Carlisle, PA 17013
(703) 524-5949 or (717) 243-0989